

## Missouri Attorney General's Opinions - 1973

Opinion	Date	Topic	Summary
<a href="#">2-73</a>	Mar 29	COMPTROLLER. CRIMINAL COSTS.	An indigent defendant is not entitled to have the cost of a mental examination under Section 552.020, RSMo Supp. 1971 or Section 552.030, RSMo 1969, by a physician "of his own choosing" taxed against the state. However, costs of mental examinations made by "independent" physicians appointed by the court pursuant to such sections are taxable against the state in cases which come under the provisions of Section 550.020, RSMo 1969.
<a href="#">5-73</a>	Dec 11		Opinion letter to the Honorable Donald E. Lamb
<a href="#">6-73</a>	May 2	COUNTIES. SHERIFFS. COUNTY PROPERTY.	A county court of a fourth class county is authorized under Section 49.270, RSMo, to accept donations of real or personal property on the condition that such donations be used by the sheriff's office to perform general patrol duties throughout the county.
<a href="#">7-73</a>	June 19	INSURANCE. PENSIONS. RETIREMENT. CITIES, TOWNS & VILLAGES.	The Board of Trustees of the Firemen's and Police Pension Fund of the City of Jennings, Missouri, organized pursuant to Section 86.583, RSMo 1969, (1) cannot apply the funds of such system toward the purchase of accidental death or permanent total disability insurance policies, but (2) can enter into a contract with an insurance company whereby the insurance company would hold the funds of the system in a "separate account" and would invest same as authorized by Section 376.309 (4), RSMo 1969.
<a href="#">8-73</a>	Jan 5	COMPENSATION. COUNTY RECORDER.	For the calendar year 1970 the recorder of deeds in a third class county which has a separate office of recorder of deeds and circuit clerk was entitled to receive the first \$4,750 in fees collected by his office as compensation and \$1,000 from the county treasury and his deputies were compensated out of the general revenue fund of the county without regard to the fees received by the office of recorder of deeds.
9-73			Withdrawn
<a href="#">12-73</a>	Feb 23		Opinion letter to Herbert R. Domke, M.D.
<a href="#">14-73</a>	Jan 30		Opinion letter to Mr. Joseph Jaeger, Jr.
<a href="#">15-73</a>	Feb 7		Opinion letter to the Honorable Charles M. LeCompt
<a href="#">17-73</a>	Mar 13	CIVIL DEFENSE. CITIES, TOWNS & VILLAGES.	The obligation to provide emergency planning coordination applies to all political subdivisions in Missouri, including constitutional charter cities. Insofar as Section 44.080 designates the executive officer of a

		CONSTITUTIONAL CHARTER CITIES.	political subdivision as the person responsible for civil defense planning, it is inapplicable to constitutional charter cities. Each charter city is entitled to designate the person responsible for supervision of its civil defense obligation. With regard to the city of Springfield, the terms of its Charter presently would appear to empower only the city manager to supervise or carry out these functions, but other provision could be made by amending the Charter.
<a href="#">18-73</a>	May 18		Opinion letter to the Honorable Robert O. Snyder
<a href="#">20-73</a>	Jan 4		Opinion letter to the Honorable Max Patten
<a href="#">21-73</a>	Apr 2	SCHOOLS.	A Missouri school board may govern the appearance of students through specifically worded and narrowly drawn dress and appearance codes only if the district can factually justify such codes as being reasonably necessary to promote intelligent conduct and control of its schools and only if the district can factually justify such codes as being reasonably necessary to carry out the educational mission of the school district.
<a href="#">22-73</a>	Mar 9	ELECTIONS. CONSTITUTIONAL LAW.	A law calling for an election on the question of whether or not to hold a constitutional convention may be enacted by initiative.
<a href="#">23-73</a>	Mar 13	SCHOOLS. TEACHERS. PUBLIC SCHOOL RETIREMENT SYSTEM.	The board of education of a school district has authority under the provisions of subsection 1 of Section 168.106, RSMo 1969 and Section 171.011, RSMo 1969, to adopt a regulation requiring a permanent teacher to retire at sixty-five years of age.
<a href="#">25-73</a>	Jan 4	CONSTITUTIONAL LAW. MOTOR VEHICLES. DRIVER'S LICENSE.	The issuance of a motor vehicle operator's license may not be refused to a person solely on the ground that he refuses to submit to a photograph, when that refusal is based solely upon religious beliefs.
<a href="#">26-73</a>	Jan 24	CIRCUIT CLERK. FEES. COSTS.	If a rule of the circuit court requires a deposit to secure a fee of the circuit clerk in civil cases specified in Section 483.540 (H.C.S. S.B. No. 496, 76th General Assembly, Second Regular Session) and the charge has accrued, fifty percent of the clerk's fee must be paid to the director of revenue each month and fifty percent to the county. If a rule of the court does not expressly allocate the deposit, the distribution of the clerk's fees is to be made after the liability for costs has been established and the costs collected in whole or in part. If, when liability has been established, accrued costs cannot be collected in full, charges not having any statutory priority or not allocated under court rule should be prorated.
<a href="#">27-73</a>	Mar 9	SCHOOLS. TUITION.	A child under the custody of the State Board of Training Schools who has been placed in his own home, a relative's home, a foster home or



		JUVENILES. BOARD OF TRAINING SCHOOLS.	a group home is entitled to attend the public school district in which such home is located without payment of tuition.
<a href="#">28-73</a>	Mar 13		Opinion letter to Mr. Joseph Jaeger, Jr.
<a href="#">29-73</a>	Apr 9		Opinion letter to Mr. Robert Neuenschwander
<a href="#">31-73</a>	Mar 28	PAUPERS. INDIGENTS. COUNTY COURTS. ANATOMICAL BOARD.	1. Sections 194.120 through 194.180, RSMo 1969, do not require that the State Anatomical Board accept the body of an indigent patient who dies in the State Chest Hospital. 2. When the State Anatomical Board is unable or unwilling to accept such body, the county court of the proper county is required to reimburse the State Chest Hospital for reasonable expenses incurred in the burial of such body. 3. The proper county within the meaning of Section 205.630, RSMo 1969, is that county in which the patient dies.
<a href="#">32-73</a>	May 16	COURT RECORDS. CIRCUIT COURTS. PUBLIC RECORDS.	Circuit clerks are authorized to microfilm closed case files more than five years old when authorized to do so by the circuit judge or judges. Circuit court files in all cases which have been closed and no action taken for more than ten years, and which have been reproduced in accordance with Section 109.120, RSMo, may be destroyed under the authority and direction of the judge or judges of the circuit court.
<a href="#">33-73</a>	Jan 5	FEES. LICENSES. STATE HIGHWAY COMMISSION. CLEAN WATER COMMISSION.	The State Highway Commission must now pay, pursuant to Section 204.051, V.A.M.S., enacted in 1972, an annual fee of \$25.00 for a permit to operate a lagoon for sanitary facilities at a rest area on state owned land on Interstate 70 in Lafayette County, which permit was originally issued on May 1, 1967.
34-73			Withdrawn
<a href="#">35-73</a>	Dec 14	ANIMALS. AGRICULTURE. STATE VETERINARIAN. CONFLICT OF INTEREST.	The payment of an indemnity to a state official for an incurred hurt, loss or damage under any provision of law when the same indemnity is available to all private citizens for identical hurts, losses or damages does not constitute a conflict of interest.
<a href="#">37-73</a>	Dec 13		Opinion letter to the Honorable N. William Phillips
<a href="#">38-73</a>	Feb 14	ELECTIONS. RESIDENCE. TAXATION (INCOME).	An individual domiciled in this state who is absent from this state and who is eligible to receive a Missouri absentee ballot for President and Vice President will be subject to the Missouri income tax law <u>unless</u> he (1) does not maintain a permanent place of abode in this state, (2) does maintain a permanent place of abode outside this state, (3) does not spend in the aggregate more than thirty days during the taxable

			year in this state, and (4) does not receive income derived from or connected with sources within this state, as defined in Section 143.181, Senate Bill No. 549, 76th General Assembly, Second Regular Session. Tax liability, if it exists, is present regardless of whether a person exercises his right to vote or not, and therefore the act of voting, by itself, does not determine whether a person is subject to the Missouri income tax law.
<a href="#">39-73</a>	Jan 3	TAXATION (CITY SALES). CITIES, TOWNS & VILLAGES.	The governing body of a city may abolish a city sales tax previously imposed as provided in Sections 94.500 to 94.570, RSMo 1969, by repealing the ordinance imposing the tax, without a subsequent vote of the qualified electors on the question of abolition.
40-73			Withdrawn
<a href="#">41-73</a>	Nov 6		Opinion letter to the Honorable L. Edward Stone, Jr.
<a href="#">42-73</a>	Jan 29	TAXATION (INCOME). CONSTITUTIONAL LAW.	A taxpayer who has a fiscal period which includes any part of 1972 and a part of 1973 may determine his tax and taxable income pursuant to the provisions of Sections 143.011 to 143.996, Senate Bill No. 549, Second Regular Session, 76th General Assembly, if he files an election to that effect with the Director of Revenue as provided in Section B of such Senate Bill.
<a href="#">43-73</a>	Nov 15	SCHOOLS. TEACHERS. RULES & REGULATIONS.	A board of education may not require a teacher to have been employed two years or more by another school district within ten years immediately prior to employment by the board of education as a condition for a waiver of one year toward tenure of a probationary period for a probationary teacher.
<a href="#">44-73</a>	Dec 13		Opinion letter to the Honorable C. E. Hamilton, Jr.
<a href="#">47-73</a>	Feb 7		Opinion letter to the Honorable Christopher S. Bond
<a href="#">48-73</a>	June 26		Opinion letter to Major General Charles M. Kiefner
<a href="#">49-73</a>	Mar 15		Opinion letter to Mr. Charles Shaffer
<a href="#">51-73</a>	Feb 23		Opinion letter to the Honorable Gene McNary
<a href="#">53-73</a>	Mar 1	COURTS. PROBATE COURTS. RETIREMENT.	Commissioners of the probate courts appointed under the provisions of Section 481.115, RSMo, applicable to probate courts of counties having more than 400,000 inhabitants are not entitled to receive any compensation under Sections 476.450, RSMo et seq., which provide for the appointment of retired judges and commissioners as special commissioners or referees.
<a href="#">54-73</a>	Jan 5		Opinion letter to the Honorable John Sims
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<a href="#">56-73</a>	Jan 17	JURY. DEPOSITS. COURT COSTS. MAGISTRATE COURTS.	The magistrate courts, in the absence of express statutory authorization, do not have the authority to, by general rule applicable to all cases, require that a plaintiff make a deposit of \$12 when a defendant in a civil case requests a jury trial.
<a href="#">57-73</a>	Feb 1	PROSECUTING ATTORNEY.	The provision of Sections 56.065 and 56.270, Senate Bill No. 515, Second Regular Session, 76th General Assembly, relating to prosecuting attorneys apply to a county of the second class in which the circuit court sits in more than one city in such county and do not apply to a second class county in which the circuit court sits in only one city unless said county has a population of more than 100,000.
<a href="#">58-73</a>	Aug 21	SCHOOLS. TEXTBOOKS. TUITION.	Section 170.051, S.C.S.S.B. 638, 76th General Assembly, requires a public school district to "purchase and loan free all textbooks" for children resident of the district who are enrolled in kindergarten classes held in a school which also enrolls students seven years of age or older.
<a href="#">60-73</a>	Jan 17	LICENSES. NURSING HOMES. DIVISION OF HEALTH. DIVISION OF MENTAL HEALTH.	Under Section 1 of H.C.S.H.B. No. 204, 76th General Assembly, Second Regular Session, the Division of Mental Health is required to adopt rules for all institutions accepting the mentally retarded including facilities operated by the Division itself. Homes and institutions which are licensed under the provisions of Chapter 198 as nursing homes by the Division of Health and which come within the provisions of Section 2 et seq., of H.C.S.H.B. No. 204 must also be licensed by the Division of Mental Health and must conform to the rules and regulations promulgated by the respective Divisions.
<a href="#">61-73</a>	Apr 11		Opinion letter to Herbert R. Domke, M.D.
<a href="#">62-73</a>	Jan 5		Opinion letter to the Honorable Frank Bild
63-73			Withdrawn
<a href="#">65-73</a>	Jan 5	CONFLICT OF INTEREST. GOVERNOR.	The disclosure of assets procedure contemplated by Governor-elect Christopher S. Bond complies with the requirements of Section 105.460, RSMo, of the conflict of interest law, which permits filings disclosing substantial interests during each session of the General Assembly in lieu of separate filings of substantial personal or private interests by the Governor in any bill before passing on such bill.
<a href="#">66-73</a>	Mar 7	SCHOOLS.	School districts may not charge fee for summer or night school to residents under twenty-one; may make charges for damage to school property and for extracurricular activities; must provide band instruments if credit is given for band participation; must furnish gym shoes to indigents; must furnish materials for making products as part of classes; may withhold transcript from student if he fails to pay a

			legal fee imposed for misuse of school property.
<a href="#">68-73</a>	Apr 5	SCHOOLS. TAXATION (SCHOOLS).	The taxpayers of three-director school districts assigned to school districts operating a high school pursuant to Subsection 2 of Section 162.096 shall pay the tax rate effective in the high school district or districts to which the common districts were assigned.
<a href="#">69-73</a>	Mar 13		Opinion letter to Mr. Joseph Jaeger, Jr.
<a href="#">71-73</a>	Jan 23		Opinion letter to the Honorable Walter H. Mueller, Jr.
<a href="#">73-73</a>	Mar 14	SCHOOLS. CONSTITUTIONAL LAW.	A person between his sixteenth and twenty-first birthdays has a right, to attend public school in the district of his residence on a part-time basis, and to take any course which he would be entitled to take were he a full-time student. This right may not be denied because the person also attends a private parochial school. A school district has a duty to accept such a student. A school district may make such reasonable rules and regulations governing part-time students as will preserve the discipline, health, and academic standards of the school, but these rules may not be such as to place an unreasonable burden on part-time attendance.
<a href="#">74-73</a>	Mar 20		Opinion letter to the Honorable Cloy E. Whitney
<a href="#">75-73</a>	Mar 14		Opinion letter to the Honorable Ralph Uthlaut, Jr.
<a href="#">77-73</a>	Feb 21	COOPERATIVE AGREEMENTS. MOTOR VEHICLES. LICENSES. FEE AGENTS.	The county and city governments of the State of Missouri cannot be appointed by the Director of Revenue as Department of Revenue fee office agents to perform those duties set out in Section 136.055, RSMo 1969, because said duties are not within the scope of the powers of city or county governments in this state.
<a href="#">78-73</a>	Jan 23		Opinion letter to the Honorable William A. Peterson
<a href="#">80-73</a>	Jan 30		Opinion letter to the Honorable Donald L. Manford
<a href="#">81-73</a>	Feb 13		Opinion letter to Mr. James B. Boillot
<a href="#">82-73</a>	Feb 13		Opinion letter to Mr. James B. Boillot
<a href="#">84-73</a>	Mar 9	CRIMINAL LAW. MINORS. PHYSICIANS.	The General Assembly has not as yet enacted any law prohibiting licensed physicians from prescribing contraceptive medications and devices to persons under the age of twenty-one who have not been emancipated by marriage or other means without obtaining the consent of such person's parents.
85-73			Withdrawn
<a href="#">87-73</a>	Feb 16	COUNTY HEALTH CENTERS. COUNTY COURT.	The board of trustees of the county health center in a county of class two which adjoins a county of the first class having a charter form of government cannot authorize the expenditure of county health center

		COUNTIES. HEALTH. RABIES. ANIMALS.	funds for rabies control.
<a href="#">88-73</a>	Apr 20	CIRCUIT JUDGES. LEGISLATORS. CONFLICT OF INTEREST.	The prohibition contained in Article III, Section 12, of the Constitution of Missouri, renders a state senator ineligible to accept an “appointive office” but such section does not preclude him from accepting an appointment to fill a vacancy in an elective office. For the purposes of Article III, Section 12, the office of circuit judge, even in a county under the nonpartisan court plan, is an elective office. Therefore, Article III, Section 12, of the Constitution of the State of Missouri does not preclude a member of the legislature from accepting nomination and appointment as a judge of the circuit court in a county under the nonpartisan court plan.
<a href="#">90-73</a>	Mar 28	COUNTY PLANNING AND ZONING.	County planning and zoning under Sections 64.510 to 64.690, RSMo, adopted by the voters of Marion County, Missouri, on November 3, 1964, cannot be terminated by a vote of the people. A county court cannot abolish the county planning commission after it has been established nor can a county court repeal all planning and zoning ordinances and regulations.
<a href="#">92-73</a>	June 19		Opinion letter to the Honorable George J. Donegan
<a href="#">96-73</a>	Oct 11		Opinion letter to Mr. Clifford L. Summers
<a href="#">97-73</a>	Mar 22		Opinion letter to the Honorable Donald L. Manford
<a href="#">100-73</a>	Feb 13		Opinion letter to Mr. James E. Riney
<a href="#">101-73</a>	Mar 22		Opinion letter to the Honorable Earl L. Schlef
<a href="#">102-73</a>	Feb 13		Opinion letter to the Honorable C. F. Cline
<a href="#">103-73</a>	Mar 27		Opinion letter to the Honorable Edna Eads
<a href="#">104-73</a>	Oct 2	SCHOOLS. TEACHERS. TEACHER TENURE. TEACHERS' CERTIFICATES.	(1) A probationary and a permanent teacher may be sued by a six-director school district as defined in Section 160.011(12), RSMo 1969, for damages which the school district can prove resulted from the teacher’s unjustified refusal to perform the agreed upon services provided for in the teacher’s contract. (2) Pursuant to Sections 168.114 through 168.120, a permanent teacher’s indefinite contract could be terminated by a school district if a teacher unjustifiably refuses to perform the services called for by the teacher’s employment contract with the school district. (3) A teacher’s teaching certificate could be revoked by the authority which issued the certificate upon satisfactory proof that the teacher has unjustifiably failed to perform the services

			called for by his employment agreement and that, therefore, the teacher has neglected his duty and/or has annulled his contract with the local school board without the consent of the majority of the members of the board which is a party to the contract as provided in Section 168.071, RSMo 1969.
<a href="#">105-73</a>	Mar 6		Opinion letter to Herbert R. Domke, M.D.
<a href="#">106-73</a>	Mar 21	COSTS. PROBATE COURT. CIRCUIT CLERKS.	The clerk of the circuit court is not entitled to charge the \$25 fee for each civil case instituted in circuit court in a probate case heard by the circuit court because of disqualification of the probate judge.
<a href="#">107-73</a>	Mar 9	COUNTIES. CONSTITUTIONAL CHARTER COUNTIES. FINANCIAL STATEMENT.	A county of the first class with a charter form of government must comply with Section 50.800, RSMo 1969, relating to county financial statements, and may not modify the form and content of the county financial statement prescribed by that section; but such a county may designate appropriate officers or agencies to perform the duties which that section otherwise imposes on county courts.
<a href="#">108-73</a>	Feb 23	CRIMINAL LAW. PUBLIC DEFENDER.	State public defenders are not prohibited by the provisions of House Bill No. 1314, 76th General Assembly, from employing additional assistants to be paid from federal grant funds for the purpose of defending indigents in juvenile and misdemeanor cases.
<a href="#">111-73</a>	Mar 19	MENTAL HEALTH.	The Division of Mental Health has authority under the provisions of House Committee Substitute for House Bill No. 204, 76th General Assembly, Second Regular Session (Section 202.831) to use Division appropriations for the care of patients in their own homes or in the homes of relatives and that such homes are not required to be licensed under Section 2 of the Bill. The Division has no authority to make payments directly to patients for their care.
<a href="#">113-73</a>	Mar 29	MILK. FARMERS. DAIRIES. AGRICULTURE.	Section 4 of House Bill No. 1280 prohibits a dairy farmer from selling raw milk to the general public from a distribution center set up by the dairy farmer and located away from his farm premises.
<a href="#">114-73</a>	Apr 4	NURSING HOMES. MISSOURI HOUSING DEVELOPMENT COMMISSION.	The Missouri Housing Development Commission, Sections 215.010, RSMo et seq., has the authority to make first mortgage loans for the construction of nonprofit facilities which will provide nursing home residential services for persons of low and moderate income who live on a permanent basis in such homes.
<a href="#">115-73</a>	Sept 12	STATE EMPLOYEES RETIREMENT SYSTEM. MAGISTRATE CLERKS. MAGISTRATES. RETIREMENT.	1. Magistrate court clerks who are paid in whole or in part out of state appropriations are entitled to membership and prior membership credit in the Missouri State Employees Retirement System. 2. Such magistrate court clerks are entitled to membership in the Missouri State Employees Retirement System on the full amount of their

		PENSION.	salaries.
<a href="#">118-73</a>	Apr 11	LIBRARIES. COUNTY LIBRARIES.	When the tax rate of the county library districts which join to form a consolidated district is less than twenty cents per hundred dollars assessed valuation, that the tax rate of the consolidated district cannot be increased above the rate previously levied by the constituent districts without an election in accordance with procedures set out in Section 182.650, V.A.M.S.
<a href="#">120-73</a>	Mar 27		Opinion letter to the Honorable James I. Spainhower
121-73			Withdrawn
<a href="#">122-73</a>	Mar 14		Opinion letter to the Honorable Albert Spradling
123-73			Withdrawn
<a href="#">124-73</a>	Apr 23	CITY ORDINANCES. CITIES, TOWNS & VILLAGES.	Subsections 6 and 7 of Section 79.450, RSMo Supp. 1971, do not grant an unlimited authority for a fourth class city to enact any ordinance it deems advisable if not in conflict with a state statute but does grant authority to enact ordinances and regulations governing matters of the same general kind and character as those expressly mentioned in Chapter 79, RSMo.
<a href="#">125-73</a>	Mar 20		Opinion letter to the Honorable Robert Fowler
<a href="#">126-73</a>	Apr 5	OFFICERS. ASSESSORS. COMPENSATION. COUNTY OFFICERS.	A county assessor appointed by the Governor to fill a vacancy in the office is required to take an oath of office as provided in Section 11, Article VII, Constitution of Missouri, and qualifies for the office as provided under Chapter 53, RSMo, and that he is not entitled to the emoluments of the office until he qualifies.
<a href="#">127-73</a>	Oct 23	STATE EMPLOYEES' RETIREMENT SYSTEM. SUPERINTENDENT OF INSURANCE. RETIREMENT. PENSIONS. GOVERNOR.	During the interval until January 1, 1975, the two elected members' terms on the board of trustees of the Missouri State Employees' Retirement System shall be served by the Superintendent of Insurance and one appointment to be made by the Governor.
129-73			Withdrawn
<a href="#">130-73</a>	July 30		Opinion letter to the Honorable Wayne Goode
<a href="#">132-73</a>	Apr 9		Opinion letter to the Honorable James I. Spainhower
<a href="#">133-73</a>	May 3	TORT DEFENSE FUND. DEPARTMENT OF CORRECTIONS. PHYSICIANS.	Interns and resident physicians of the University of Missouri Medical Center who provide medical services on an irregular basis without further compensation under the supervision and direction of the Medical Director of the Missouri Department of Corrections are

			"employees" or "agents" of the Missouri Department of Corrections as those terms are used in Section 105.710 (Senate Bill No. 428, 76th General Assembly), and those interns and resident physicians are included for coverage under the Missouri Tort Defense Fund.
<a href="#">134-73</a>	May 7	LICENSES. MENTAL HEALTH.	The Division of Mental Health has no authority to return license fees which accompany applications for the licensing of homes for the mentally retarded under H.C.S.H.B. No. 204, 76th General Assembly, Second Regular Session, even though a license is denied. However, in those cases where it is patently clear that the applicant is not required to have a license under such laws and no inspection is necessary, the applicant's fee should not be deposited in general revenue but should be returned to him.
<a href="#">135-73</a>	Mar 14		Opinion letter to Mr. Charles Valier
136-73			Withdrawn
<a href="#">137-73</a>	May 4		Opinion letter to Mr. Harold L. Fridkin
<a href="#">139-73</a>	Apr 17		Opinion letter to Herbert R. Domke, M.D.
<a href="#">142-73</a>	May 23		Opinion letter to the Honorable Earl L. Schlef
<a href="#">143-73</a>	May 2	ELECTIONS. REGISTRATION.	County local option registration under Chapter 114, RSMo, may begin at any time after the law becomes operative following publication of the adoption of local option registration and must begin by the fifteenth day of September following such adoption. Such registration must be concluded as soon as possible. Voter registration is required for elections covered by Chapter 114 after voter registration is concluded.
<a href="#">145-73</a>	June 1		Opinion letter to the Honorable Walter H. Mueller, Jr.
<a href="#">147-73</a>	Apr 19		Opinion letter to the Honorable William Dick Fickle
<a href="#">149-73</a>	July 11	SCHOOLS. SCHOOL DISTRICTS. TAXATION (SCHOOLS). SPECIAL SCHOOL DISTRICTS.	A special school district formed under the provisions of House Bill 1096, 76th General Assembly, Sections 178.640-178.765, V.A.M.S. (1) would immediately upon formation become responsible for providing vocational education and special education for physically and mentally handicapped children resident within the county or counties included in the special district; however, the board of education of a special district would be required to accomplish at any given time only that which is reasonably possible; (2) would have no legal obligation to employ special education teachers under contract by component districts at the time of formation of the special district; (3) should present an estimate of the amount of money to be raised by taxation for the ensuing school year and the tax rate necessary to sustain the schools of the special district for the ensuing school year to the county



			clerk of each county included within the special district on or before July 15; and (4) may secure special educational services and vocational training services for children within its boundaries by contracting with any school district which has authority to furnish such services. If House Bill 474, 77th General Assembly, is signed by the Governor, it will not affect the organization or existence of an already existing special district, but will govern the operations of all special districts.
<a href="#">150-73</a>	Apr 19		Opinion letter to the Honorable Clifford B. Mayberry
<a href="#">151-73</a>	May 3	BOATS. CONSTITUTIONAL LAW. MISSOURI BOAT COMMISSION.	Senate Bill No. 123 of the 76th General Assembly, enacting a new Section 306.260 relating to marine toilets on boats, is constitutional.
<a href="#">152-73</a>	May 11		Opinion letter to the Honorable William J. Esely
153-73			Withdrawn
154-73			Withdrawn
<a href="#">157-73</a>	Oct 2	SCHOOLS. CONTRACTS. CONSTITUTIONAL LAW.	Section 38(a) and Section 39(3), Article III, Missouri Constitution, prohibit a school board and the district superintendent from terminating a partially performed three-year contract and executing a new contract providing for the performance of the same duties at a greater compensation when the only reason for doing so is an increase in the number of students attending the school district.
<a href="#">160-73</a>	Apr 9		Opinion letter to the Honorable Wesley A. Miller
<a href="#">163-73</a>	July 24	ORDINANCES. TAXATION (CITY SALES).	The one percent city sales tax act in the City of St. Louis is a valid levy after March 22, 1973, thus the Director of Revenue is required to continue to collect the tax.
<a href="#">164-73</a>	Apr 9		Opinion letter to the Honorable Jewel Kennedy
<a href="#">165-73</a>	May 30	TAXATION. UTILITIES. ASSESSMENTS. COUNTY ASSESSOR.	The microwave station including the tower, equipment, and real estate on which it is situated owned by the American Telephone and Telegraph Company and located in Morgan County should be assessed by the county assessor of Morgan County.
<a href="#">166-73</a>	May 14	STATE FUNDS. BOARD OF FUND COMMISSIONERS.	The Board of Fund Commissioners may not transfer funds in the Second State Building Fund to general revenue.
<a href="#">167-73</a>	June 19		Opinion letter to the Honorable C. David Darnold
<a href="#">169-73</a>	June	SUPREME COURT	A professional criminal bondsman has no authority to carry concealed

	11	RULES. CITIES, TOWNS & VILLAGES. CONCEALED WEAPONS. FIREARMS. POLICE. BONDS.	weapons. Further, under Supreme Court Rule 32.14, a peace officer cannot be accepted as a surety on any bail bond. An individual cannot be appointed as a peace officer for the purpose of carrying a concealed weapon.
<a href="#">171-73</a>	June 4	CRIMINAL LAW. SUNDAY SALES.	A not-for-profit civic club which operates a gift shop manned by unpaid volunteer workers selling goods, wares, and merchandise prohibited from sale on Sunday under Section 563.721, RSMo, is not exempt from the provisions of this statute even though the profits are contributed to charity.
<a href="#">172-73</a>	May 11	PRINTING. GENERAL ASSEMBLY. PURCHASING AGENT. DEPARTMENT OF REVENUE.	The printing of all stationery, bills, journals, and other printing of the legislature or any of its creatures such as legislative joint committees, interim committees or commissions must be purchased by the commissioner of administration pursuant to the provisions of Sections 34.170 through 34.250, RSMo.
<a href="#">173-73</a>	June 18		Opinion letter to Ms. Margie Butler
<a href="#">176-73</a>	Dec 21	COUNTIES. COUNTY PURCHASES. CONSTITUTIONAL CHARTER COUNTIES.	A county of the first class having a charter form of government may not adopt an ordinance which purports to establish a minimum monetary requirement for advertising for bids for supplies, equipment, materials or services greater than that established by Section 50.660, RSMo 1969.
<a href="#">177-73</a>	May 7		Opinion letter to the Honorable William B. Waters and the Honorable Stan Thomas
<a href="#">178-73</a>	Aug 23	SCHOOLS.	A grading system must bear a rational relationship to a legitimate educational goal and must be reasonably administered. A teacher may take a student's tardiness into account in determining the student's grade when the tardiness affects the student's performance in the class. However, this office will not decide whether any particular grade was improperly lowered due to the consideration of possibly irrelevant factors, since this is not the sort of question appropriate for resolution by the Attorney General, and it is a decision which has been entrusted by Missouri law to local school officials.
<a href="#">179-73</a>	June 8		Opinion letter to the Honorable William Raisch
<a href="#">180-73</a>	May 24		Opinion letter to the Honorable Donald J. Hancock
<a href="#">181-73</a>	May 4		Opinion letter to the Honorable Vic Downing

<a href="#">182-73</a>	May 7		Opinion letter to the Honorable Lawrence J. Lee
<a href="#">183-73</a>	Dec 27		Opinion letter to the Honorable DeVerne Calloway
<a href="#">184-73</a>	Oct 15	SCHOOLS.	A public school district may accept voluntary donations or contributions from individuals to help defray the costs of educational programs offered by the district. The contributor may specify the program to be aided by his donation, and the school district may bind itself to use the money for that purpose provided that in so doing it does not discriminate between students on the basis of whether they or their parents have made a donation.
<a href="#">185-73</a>	May 15	GOVERNOR. DIVISION OF WELFARE. PUBLIC CALAMITY. CONSTITUTIONAL LAW.	The Governor of the state of Missouri has authority under the provisions of Chapter 44, RSMo, to declare that an emergency exists because of a natural disaster of major proportions and to expend appropriations available for providing relief pursuant to a state plan for the benefit of persons affected by the disaster.
<a href="#">186-73</a>	May 17	UNIVERSITIES. APPROPRIATIONS.	The General Assembly may authorize the expenditure of state funds for capital improvement purposes on the campuses of Missouri Western State College and Missouri Southern State College.
<a href="#">188-73</a>	Aug 13		Opinion letter to Mr. James L. Wilson
<a href="#">191-73</a>	May 24		Opinion letter to Dr. Richard S. Brownlee
<a href="#">193-73</a>	May 30		Opinion letter to the Honorable Robert Fowler
<a href="#">194-73</a>	May 29	OFFICERS. PUBLIC DEFENDERS. GENERAL ASSEMBLY.	Public defender offices created under the provisions of Senate Committee Substitute for House Bill No. 1314, 76th General Assembly, Second Regular Session, may be abolished during the terms of the incumbent public defenders. The incumbents have no right to any salary after the offices are abolished.
<a href="#">196-73</a>	Sept 4	WATER SUPPLY DISTRICTS.	A public water supply district organized under Chapter 247, RSMo, cannot charge a property owner or the tenant of real property for delinquent water bills of former tenants.
<a href="#">198-73</a>	May 29		Opinion letter to Mr. B. W. Robinson
<a href="#">200-73</a>	May 30		Opinion letter to Mr. James S. McClellan
<a href="#">202-73</a>	June 5		Opinion letter to Dr. Arthur L. Mallory
203-73			Withdrawn
<a href="#">205-73</a>	June 27		Opinion letter to the Honorable Frederick T. Dyer
<a href="#">209-73</a>	June		Opinion letter to the Honorable John D. Schneider

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<a href="#">214-73</a>	July 20		Opinion letter to Dr. Arthur L. Mallory
<a href="#">216-73</a>	June 27		Opinion letter to Dr. Arthur L. Mallory
217-73			Withdrawn
<a href="#">218-73</a>	Aug 21	CLEAN AIR. AIR CONSERVATION.	The Missouri Air Conservation Commission does not have the authority under Chapter 203, V.A.M.S., to prevent the construction of “complex sources” when it is determined that such sources may indirectly cause ambient air quality standards to be violated.
<a href="#">222-73</a>	Sept 4		Opinion letter to the Honorable Christopher S. Bond
<a href="#">224-73</a>	July 11	ELECTIONS. PRIMARIES. POLITICAL PARTIES. VOTING MACHINES.	A voter using a voting machine in a state primary election must declare the political party for which he desires to vote or that he wishes to vote a nonpartisan ballot before entering the voting booth. The voting machine must be set so that the voter can vote only according to such choice.
<a href="#">225-73</a>	Nov 19	STATE AGENCY. CONSTITUTIONAL LAW. ENVIRONMENTAL PROTECTION AGENCY.	The Environmental Improvement Authority (EIA), created by House Bill No. 1041, 76th General Assembly, is not a “state agency” within the meaning and operation of Sections 13, 23, 24, and 27 of Article IV of the Constitution of the state of Missouri and that the revenues of the Authority are not within the meaning of “state funds” as used in Article IV, Section 15.
<a href="#">227-73</a>	Aug 20		Opinion letter to the Honorable Jack E. Gant
<a href="#">228-73</a>	June 28	MENTAL HEALTH. JUVENILES. MINORS.	The Division of Mental Health has the authority and the duty to charge for the care and treatment of a juvenile committed to the Division of Mental Health by the juvenile court or transferred to the Division of Mental Health from the State Board of Training Schools pursuant to Section 211.201, RSMo, if such person is determined to be a private patient pursuant to the provisions of Section 202.863, RSMo.
<a href="#">229-73</a>	Aug 20	WATER POLLUTION. SEWERS.	Municipalities and sewer districts have authority to make the user charges to industries required by the Federal Water Pollution Control Act Amendments of 1972 and to establish the reserves for future expansion or reconstruction.
<a href="#">232-73</a>	Nov 16		Opinion letter to Mr. Charles L. Arnold, Sr.
<a href="#">233-73</a>	Nov 7		Opinion letter to Mr. John A. Hailey
234-73			Withdrawn
<a href="#">235-73</a>	Dec 6		Opinion letter to Colonel Samuel S. Smith
<a href="#">_____</a>			

<a href="#">236-73</a>	Nov 21		Opinion letter to the Honorable Ralph L. Martin
<a href="#">238-73</a>	Nov 8	ELECTIONS. REGISTRATION.	The provisions of Section 51.310 (House Bill No. 667, 77th General Assembly), which provide for additional compensation to certain county clerks for performance of duties under Section 51.121 (House Bill No. 667, 77th General Assembly), constitute an increase in compensation to county clerks of counties in which the county clerk was required to perform the duties under Section 51.121, RSMo 1969, before September 28, 1971, and is not effective during such clerks' present terms of office but is effective as to clerks coming under the provisions of Section 51.121 after September 28, 1971. Such payments may be made for 1974 and thereafter to clerks in counties in which registration is first required under House Bill No. 20, 77th General Assembly.
<a href="#">239-73</a>	Aug 21	SHERIFFS. MAGISTRATES. MAGISTRATE CLERKS. FINES, PENALTIES & FORFEITURES.	CCSHCS for Senate Bill No. 100 of the 77th General Assembly, effective September 28, 1973, authorizes the clerks of the magistrate courts of certain counties to collect fines, penalties and forfeitures and other sums of money accruing to the state by virtue of a magistrate court order but requires the sheriffs of such counties to make such collections if the clerks do not do so.
<a href="#">240-73</a>	Aug 24	TAXATION (INCOME). CONSTITUTIONAL LAW.	The property tax relief act for the elderly (CCSHB Nos. 149, 417, 425, 471 and 47, 77 <sup>th</sup> General Assembly) applies for the entire calendar year of 1973.
<a href="#">241-73</a>	Oct 11		Opinion letter to the Honorable William E. Seay
<a href="#">242-73</a>	Dec 21		Opinion letter to Mr. Jack Smith
<a href="#">244-73</a>	July 20		Opinion letter to Ms. Ann Bowling
<a href="#">245-73</a>	July 20		Opinion letter to Mr. Henry Maddox
<a href="#">247-73</a>	Dec 20	LIBRARIES.	House Bill 1114 of the 76th General Assembly, Section 182.620, V.A.M.S., provides two alternative methods for the creation of a consolidated public library district. One calls for action by the respective library boards and the county court or the county chief executive officers and the other for an election after a petition of five percent of the registered voters has been submitted. If the first procedure is followed, a district is created and no election under the second procedure may be held to rescind the action creating the district.
<a href="#">248-73</a>	Aug 8		Opinion letter to the Honorable James I. Spainhower
<a href="#">249-73</a>	July 30		Opinion letter to Dr. Arthur L. Mallory
<a href="#">251-73</a>	Aug 27		Opinion letter to the Honorable James A. Noland, Jr.

<a href="#">255-73</a>	Aug 22	ST. LOUIS COURT OF CRIMINAL CORRECTIONS. BONDS. BAIL.	Under Section 479.120, RSMo, the St. Louis Court of Criminal Corrections is in session every day of the week, except Sundays, state and national holidays unless the court has adjourned. The fact that the judge is not sitting on the bench is not determinative of whether the court is still in session. Only after the judge has officially adjourned the court for the day or for a longer period of time may the clerk of the St. Louis Court of Criminal Corrections set and accept bail as provided for under Section 544.530 (House Bill No. 1160, 76th General Assembly) and Supreme Court Rule 32.01. The clerk must look to the rulings of the court to determine when it has adjourned and thus is no longer “in session.”
<a href="#">256-73</a>	Dec 6		Opinion letter to the Honorable William S. Bandom
<a href="#">262-73</a>	Sept 4	RECORDERS. DEEDS OF TRUST.	When mortgages or deeds of trust have been recorded on microfilm, the acknowledgment of satisfaction or release can be executed only by written release as required by Chapter 443, RSMo, and recorded on microfilm as provided in Section 109.120, RSMo.
<a href="#">265-73</a>	Aug 30	ELECTIONS. REGISTRATION. COUNTY CLERKS.	Persons who are legally registered to vote under the provisions of Chapters 114 and 116, RSMo, on September 28, 1973, are not required to re-register under House Bill No. 20, 77 <sup>th</sup> General Assembly.
<a href="#">269-73</a>	Aug 22		Opinion letter to the Honorable Robert O. Snyder
<a href="#">270-73</a>	Sept 20		Opinion letter to the Honorable James A. Noland, Jr.
<a href="#">273-73</a>	Nov 7		Opinion letter to the Harold P. Robb, M.D.
<a href="#">274-73</a>	Sept 5	ELECTIONS. REGISTRATION.	1. It is mandatory that registration of voters in counties that adopted voter registration under Chapter 114, RSMo, be commenced by September 15 following the election at which voter registration was adopted. 2. Counties which have adopted voter registration under Chapter 114, RSMo, prior to September 28, 1973, will not be reimbursed by the state for cost of registration under Section 22 of SSHCSHB No. 20. 3. Only persons who are registered voters in Cole County are eligible to vote on November 6, 1973, on the formation of a county-wide sewer district.
<a href="#">275-73</a>			Opinion letter to School Boards Employing Restrictive Insurance Practices
<a href="#">276-73</a>	Sept 5	AGE. POLICE. OFFICERS.	The provision of Section 84.480, RSMo Supp. 1971, which prohibits the appointment of a person as chief of police of Kansas City who is “more than sixty years of age” applies to a person who has reached his sixtieth birthday.
<a href="#">278-73</a>	Dec 20		Opinion letter to Mr. Charles O’Halloran

<a href="#">279-73</a>	Dec 20		Opinion letter to Mr. Charles O'Halloran
<a href="#">282-73</a>	Sept 18	LICENSES. AMBULANCES. DIVISION OF HEALTH.	Senate Bill No. 57, 77th General Assembly, does not require that attendants or attendant-drivers of ambulances must be licensed as mobile emergency medical technicians. Subsection (11) of Section 1 and Section 9 of Senate Bill No. 57 become effective September 28, 1973, and all other provisions of said act become effective July 1, 1974. However, since Section 1, subsection (8) provides the Director of the State Division of Health is the "license officer" and this section does not become effective until July 1, 1974, the Director of the Division of Health does not have authority to issue a license to a "mobile emergency medical technician" until that date.
<a href="#">284-73</a>	Sept 4		Opinion letter to the Honorable Wesley A. Miller
<a href="#">285-73</a>	Nov 14		Opinion letter to Mr. Peter W. Salsich, Jr.
<a href="#">287-73</a>	Dec 21	LABOR. FEMALE LABOR.	Section 292.170, RSMo, which requires seating for women at work is partially in conflict with Title 42 U.S.C. Sec. 2000e and 29 C.F.R. Sec. 1604.2(b)(4) and in such areas of conflict the state law must give way to the federal requirements. Therefore, an employer must provide seats for all employees or prove that business necessity precludes such seats and not provide them for any employees.
<a href="#">288-73</a>	Dec 21	LABOR. FEMALE LABOR.	Section 290.060, RSMo, dealing with the employment of pregnant women, has been superseded by 42 U.S.C., § 2000e-2(a) and 29 C.F.R., § 1604.2(b) and employers are no longer required to comply with such statute.
<a href="#">291-73</a>	Sept 18	TAXATION. ASSESSMENTS. TAXATION (SCHOOLS). TAXATION (CITIES, TOWNS & VILLAGES).	Municipalities and school districts lying within a county in which personal property assessment increased over ten percent from the previous year must revise and lower their tax levies where said levies were determined and certified to the county clerk prior to the increased assessment in accordance with the provisions of Section 137.073, RSMo 1969, even though the property assessment in such particular districts or municipalities did not increase by ten percent.
<a href="#">295-73</a>	Dec 19		Opinion letter to the Honorable Paul L. Bradshaw
296-73	Sept 26		Opinion letter to the Honorable Clarence W. Hawk
299-73			Withdrawn
<a href="#">300-73</a>	Oct 23	LEASES. PURCHASING AGENT.	The state may, under Chapter 34, RSMo, negotiate directly for all leases of real estate, and such leases do not have to be bid.
301-73			Withdrawn
<a href="#">303-73</a>	Nov 13		Opinion letter to Dr. Arthur L. Mallory
<a href="#">_____</a>			

<a href="#">304-73</a>	Sept 27		Opinion letter to Reuben R. Rhoades
<a href="#">306-73</a>	Oct 15	SHERIFFS. MAGISTRATES. MAGISTRATE CLERKS.	Where the clerk of the magistrate court and not the sheriff collects certain sums of money under amended Section 57.130, (Senate Bill No. 100, 77th General Assembly, effective September 28, 1973), the clerk has no authority to collect the ten percent commission under subsection 6 of Section 57.290, (Senate Bill No. 516, 76th General Assembly).
<a href="#">308-73</a>	Dec 7	TAXATION (INTANGIBLE)	1974 is the final calendar year during which liability can be incurred for the intangible tax of Chapter 146, RSMo 1969, but this liability is based upon the yield of intangible personal property during 1973 rather than 1974; and the yield of intangible personal property during 1974 will not be the basis for the computation for any future intangible tax. The final date for filing intangible tax returns will be April 15, 1974.
<a href="#">310-73</a>	Dec 14	APPROPRIATIONS. ADOPTED CHILDREN. FOSTER HOME CARE. DIVISION OF WELFARE.	Payments for children who have been adopted and for whom foster care payments have been paid under the homeless, dependent, and neglected foster care program of the state of Missouri cannot be made from the funds appropriated for payment of the state's share of the cost of family foster home care of homeless, dependent or neglected children.
<a href="#">311-73</a>	Nov 30	COURT RECORDS. PUBLIC RECORDS. SUNSHINE BILL.	With respect to Act 172, 77th General Assembly that: 1. Section 7 of the Act applies to all records of prosecuting attorneys, law enforcement agencies, and magistrate courts which pertain to the case of a person who has been arrested and charged. 2. Records required to be closed under Section 7 of the Act are not to be expunged, but they are available to courts and law enforcement agencies only for purposes of litigation and otherwise must be inaccessible to the general public.
<a href="#">312-73</a>	Dec 17	FINES. COUNTIES. CRIMINAL LAW. CITY ORDINANCES. COUNTY ORDINANCES. CONSTITUTIONAL LAW. CITIES, TOWNS & VILLAGES.	Article IX, Section 7 of the Constitution of Missouri prohibits the passage of state statutes which would allocate to the training of law enforcement personnel any funds collected as fines for the violation of state laws. However, there is no constitutional prohibition against the passage of state statutes (or county or municipal ordinances, in the absence of such state statutes) which would mandate allocations to the training of law enforcement personnel from funds collected as fines for the violation of county or municipal ordinances.
<a href="#">317-73</a>	Oct 23	LEGISLATORS.	A state representative may not be employed to produce an annual report for the Land Clearance for Redevelopment Authority of the City of Springfield, because such employment violates Article III, Section 12 of the Constitution of Missouri.



<a href="#">321-73</a>	Dec 10	ARRESTS. CRIMINAL PROCEDURE. PUBLIC RECORDS.	With respect to Sections 6, 7 and 8 of Senate Bill No. 1, 77th General Assembly, relating to arrest records, 1. The provisions of the first sentence of Section 6 and the provisions of Section 7, relating to the closing of records of arrested persons, apply throughout the state of Missouri. 2. The second sentence of Section 6, relating to expungement of records of arrested persons, applies to all records, wherever maintained, of arrests which take place within the geographical confines of any city or county having a population of five hundred thousand or more. 3. Section 6 of the Act does not require closing of the records of an arrest if that arrest results in any criminal charge against the arrested person within thirty days. 4. Under Section 7 of the Act, official records need not be closed unless all charges arising out of an arrest are subsequently nolle prossed, dismissed, or result in findings of not guilty. 5. Section 7 of the Act requires that official records be closed where the original indictment or information against the accused is dismissed and an information charging the accused with a different offense is subsequently filed, but does not apply where an amended information is filed charging the same offense as previously charged by indictment or information.
<a href="#">323-73</a>	Dec 10	BAIL. POLICE. SUMMONS.	With respect to the issuance of summonses and the acceptance of bail by police officers of the City of St. Louis: 1. Neither the judges nor the prosecutors have the authority to establish systems or standards for the issuance of summonses for city ordinance or state law violations to be used by the St. Louis police department. 2. Police officers have authority under Supreme Court Rule 37.09 to serve a person with a summons instead of arresting such person in any case in which it is lawful for such officers to arrest the person without a warrant for violation of a city ordinance. In traffic cases Supreme Court Rule 37.46, which authorizes the issuance of a summons by police officers in the form of the uniform traffic ticket, is applicable to state misdemeanor traffic violations as well as municipal ordinance traffic violations. 3. Police officers in charge of the station houses in St. Louis, under Section 84.230, RSMo, have the authority, within certain limitations, to accept bail from a person arrested for a municipal violation or a violation of state law. 4. The Board of Police Commissioners has supervisory authority over officers acting pursuant to Supreme Court Rules 37.09 and 37.46 and Section 84.230, RSMo.
<a href="#">330-73</a>	Dec 18	SUNSHINE BILL. COUNTY COUNCIL. PUBLIC MEETINGS.	Meetings of the "committee of the whole" and subcommittees of the St. Louis County Council are "public meetings" within the meaning of Section 1(1) of Senate Bill No. 1, 77th General Assembly, First Regular Session, and thus are required to be open to the public by Section 2 of said bill.

<a href="#">332-73</a>	Nov 16	LEGISLATORS. GENERAL ASSEMBLY. CONSTITUTIONAL LAW. CONFLICT OF INTEREST.	A member of the General Assembly is not prohibited by the Constitution or state law from renting real estate which he owns to a state agency.
<a href="#">341-73</a>	Dec 19		Opinion letter to the Honorable Cloy E. Whitney
<a href="#">342-73</a>	Nov 21	APPROPRIATIONS. DIVISION OF WELFARE. AID TO DEPENDENT CHILDREN.	The provisions of House Bill No. 156, 77th General Assembly, providing for benefit payments to aid to the blind and House Bill No. 514, 77th General Assembly, providing for benefits to aid to dependent children are in effect only until January 1, 1974, and thereafter the provisions of Senate Bill No. 325, 77th General Assembly, govern.
<a href="#">343-73</a>	Nov 21	USURY.	A national bank may charge interest at the rate permitted by state law, or at a rate of one percent in excess of the discount rate prescribed by the federal reserve bank for the district in which the national bank is situated, whichever is higher.
<a href="#">352-73</a>	Dec 28		Opinion letter to Mr. James R. Spradling
<a href="#">354-73</a>	Dec 13	SUNSHINE BILL. CRIMINAL PROCEDURE. CRIMINAL LAW. ARREST.	When a person is arrested and charged with an offense within thirty days of the arrest but the case is nolle prossed, official records pertaining to the case, including records of the arrest, are to be closed but are not subject to expungement.
<a href="#">358-73</a>	Dec 13		Opinion letter to the Honorable Richard E. Martin
<a href="#">361-73</a>	Dec 6		Opinion letter to the Honorable Max Bacon and the Honorable George J. Donegan
<a href="#">363-73</a>	Dec 4	CRIMINAL LAW. PUBLIC DEFENDER. COOPERATIVE AGREEMENTS.	Public defenders, except when operating under certain federal grants, have no authority to provide services to indigent juveniles or indigents charged with misdemeanors and cannot contract with the City of St. Louis for additional assistants to perform such services.
375-73			Withdrawn

COMPTROLLER:  
CRIMINAL COSTS:

An indigent defendant is not entitled to have the cost of a mental examination under Section 552.

020, RSMo Supp. 1971 or Section 552.030, RSMo 1969, by a physician "of his own choosing" taxed against the state. However, costs of mental examinations made by "independent" physicians appointed by the court pursuant to such sections are taxable against the state in cases which come under the provisions of Section 550.020, RSMo 1969.

OPINION NO. 2

March 29, 1973

Honorable Christopher S. Bond  
Governor of Missouri  
Office of Administration  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Governor Bond:

Mr. John C. Vaughn, the State Comptroller, requested an official opinion of the Attorney General as to the inquiry hereinafter set forth. Because the functions of State Comptroller have succeeded to the Office of Administration, and the Comptroller's duties to the Commissioner of Administration, and, since in the absence of a Commissioner of Administration, the Governor shall take charge of such office and superintend the business thereof, we are therefore directing this opinion to you.

Mr. Vaughn requested an official opinion of the Attorney General as to the following question:

"Does Section 552.080, Section 2 RSMo. 1969, require the office of Budget and Comptroller to reimburse the County for fees or expenses provided in Sub-Section 1 of Section 552.080 RSMo. 1969, if the defendant has requested the psychiatric examination and is subsequently sentenced to the Department of Corrections?"

He also advised that:

"There is a difference of opinions regarding this matter between the Prosecuting Attorney of Greene County and the office of Budget and

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Comptroller. This office at the present time, allows payment for the examination when a person is acquitted of a crime punishable solely by imprisonment in the Department of Corrections, and when the examination is requested by the Prosecuting Attorney under the provisions of Chapter 550 RSMo. 1969."

In our Opinion No. 56 dated January 27, 1966, to the Honorable Claude E. Curtis, copy enclosed, we held that such cost of examination of indigents incurred by the appointment of physicians by the court were not costs incurred on behalf of the defendant within the meaning of Chapter 550 relating to costs in criminal cases. We also held in that opinion that costs of an examination by a physician of the defendant's own choosing are costs incurred on his behalf.

In our later opinion No. 340 and addendum thereto dated December 10, 1971, to the Honorable Dee Wampler, copy enclosed, we reaffirmed our holding in the opinion to Curtis and further stated that our view is that the cost of examinations made by physicians appointed by the court are not costs incurred on behalf of the defendant and where otherwise taxable against the state are so taxable.

In order to more closely draw the distinction which you require, please note that subsection 4 of Section 552.020, RSMo Supp. 1971, expressly provides that:

" . . . Within five days after the filing of the report [of the physician or physicians appointed by the court to make the examination under subsection 2], both the accused and the state shall, upon written request, be entitled to an order granting them an examination of the accused by a physician of their own choosing and at their own expense. . . ."

A similar provision is contained in subsection 4 of Section 552.030, RSMo 1969. Therefore, with respect to costs incurred by reason of the appointment of a physician of a defendant's "own choosing" whether such defendant be indigent or not such costs cannot be paid by the state.

As we have noted, however, in the enclosed opinions, both Sections 552.020 and 552.030 provide for the appointment of physicians by the court. In the case of an indigent, the distinction between "a physician of their own choosing" and the appointment of an "independent" physician by the court is made clear by the holding of

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the Missouri Supreme Court in State ex rel. Hoover v. Bloom, 461 S.W.2d 841, 844 (Mo. banc 1971) in which the court stated that the provision of the statute providing for a selection of a physician of one's choosing at his own expense is nothing more than a declaration of what has always been a privilege of a person of means. However, the court concluded the indigent relator was not entitled to an examination by a physician of his own "choosing" but, in the first instance, it is for the trial court to make the selection of a physician to make an "independent" examination and the judge should convince himself that the court appointed physician can function in such capacity.

The thrust of your question is whether under Chapter 550 and particularly Sections 550.010 and 550.020, RSMo 1969, the state is prohibited from paying such costs because such statutes prohibit the payment of costs incurred on the part of the defendant.

Section 550.010 provides:

"Whenever any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for board, shall be paid by the state or county."

Section 550.020 provides in part:

"1. In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant."

However, as noted in our opinion to Curtis and in our subsequent opinion to Wampler, the costs resulting from the appointment of an independent physician by the court on behalf of an indigent under Sections 552.020 and 552.030 are not costs incurred on the part of such defendant within the meaning of Sections 550.010 and 550.020. This view is supported by the decision of the Supreme Court in State ex rel. Hoover v. Bloom, above. Thus, while an indigent is not entitled to have the state pay for the examination

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by a physician "of his own choosing," he is nonetheless entitled to an "independent" examination by a physician appointed by the court.

We further note by comparison that the Missouri Supreme Court in Cramer v. Smith, 168 S.W.2d 1039, 1041 (Mo. banc 1943) held, with respect to the statutory provisions relating to furnishing transcripts on appeal to indigents, that:

"It is not contended that the provision of Section 13344 [now Section 485.100, RSMo Supp. 1971], that the 'court reporter's fees for making the same [transcript] shall be taxed against the state or county as may be proper,' (Emphasis ours) which is found in Chapter 94 in relation to court reporters, authorizes a judgment, as for costs, against either the state or county as of the time the order is made. A fair construction requires us to hold that the language means said fee is to be taxed as costs, in the same manner as other costs are taxed, but with ultimate liability for the same on the state or county as may be proper under the general statutes in relation to criminal costs. Being thus relegated to the general statutes, it is apparent the provision of Section 13344 casting liability for such transcript on 'the state or county as may be proper' cannot be reconciled with Sections 4221 [now Section 550.020, RSMo 1969] and 4222 [now Section 550.030, RSMo 1969], both of which expressly provide that neither the state nor county shall pay such costs 'as were incurred on the part of the defendant.' Section 13344, being the later enacted statute, must be held to have repealed, by necessary implication, the contrary provisions of Sections 4221 and 4222, to the extent noted."

The above holding is applicable in the premises because under Section 552.080 the costs are payable by the county as an interim payment (State v. Siecke, 472 S.W.2d 367 (Mo. banc 1971)) to be repaid by the state "where the state . . . is liable for such costs under the provisions of chapter 550, RSMo." Thus, the contrary limitation imposed by Sections 550.020 and 550.030 excluding costs incurred on behalf of the defendant in such a case is, as in Cramer, repealed by necessary implication to the extent of the conflict.



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" . . . The right of the defendant to an examination by a specialist at the expense of the State would depend upon either a statute or rule granting such right or that it was essential to due process of law. . . ." State v. Aubuchon, 381 S.W.2d 807, 813 (Mo. 1964)

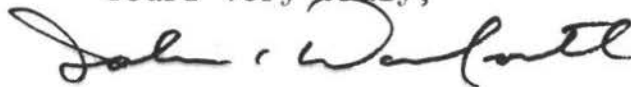
In the premises, it is our view that that right is granted by statute and is essential to due process.

#### CONCLUSION

It is, therefore, the opinion of this office that an indigent defendant is not entitled to have the cost of a mental examination under Section 552.020, RSMo Supp. 1971 or Section 552.030, RSMo 1969, by a physician "of his own choosing" taxed against the state. However, costs of mental examinations made by "independent" physicians appointed by the court pursuant to such sections are taxable against the state in cases which come under the provisions of Section 550.020, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 56  
1/27/66, Curtis

Op. Ltr. No. 340  
12/10/71, Wamper

December 11, 1973

OPINION LETTER NO. 5  
Answer by letter-Wieler

Honorable Donald E. Lamb  
Prosecuting Attorney  
Reynolds County  
P. O. Box 52  
Centerville, Missouri 63633



Dear Mr. Lamb:

This is in response to your request as to whether or not the Ozark New Era Weekly newspaper is qualified under Section 493.050, RSMo 1969, to publish advertisements and orders of publication required by law to be made and all legal publications affecting the title to real estate in Reynolds County.

Section 493.050 provides:

"All public advertisements and orders of publication required by law to be made and all legal publications affecting the title to real estate, shall be published in some daily, triweekly, semiweekly or weekly newspaper of general circulation in the county where located and which shall have been admitted to the post office as second class matter in the city of publication; shall have been published regularly and consecutively for a period of three years; shall have a list of bona fide subscribers voluntarily engaged as such, who have paid or agreed to pay a stated price for a subscription for a definite period of time; provided, that when a public notice, required by law, to be published once a week for a given number of weeks, shall be published in a daily, triweekly, semiweekly or weekly newspaper, the notice shall appear once a week, on the same day of each



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week, and further provided, that every affidavit to proof of publication shall state that the newspaper in which such notice was published has complied with the provisions of this section; provided further, that the duration of consecutive publication herein provided for shall not affect newspapers which have become legal publications prior to the effective date of this section, provided, however, that when any newspaper shall be forced to suspend publication in any time of war, due to the owner or publisher being inducted into the armed forces of the United States, the same may be reinstated within one year after actual hostilities shall have ceased, with all the benefits under the provisions of this section, upon the filing with the secretary of state of notice of intention of said owner or publisher, his widow or legal heirs, to republish said newspaper, setting forth the name of the publication, its volume and number, its frequency of publication, and its readmission to the post office where it was previously entered as second class mail matter, and when it shall have a list of bona fide subscribers voluntarily engaged as such who have paid or agreed to pay a stated price for subscription for a definite period of time. All laws or parts of laws in conflict with this section except sections 493.070 to 493.120, are hereby repealed."

You have informed us that the Ozark New Era Weekly newspaper has been published regularly and consecutively for a period of more than three years. We have also been told that the paper has a general circulation in Reynolds County and approximately 650 bona fide voluntary subscribers in Reynolds County. However, the newspaper is printed and published in Salem, Missouri, which is in Dent County, and has been admitted by the post office in Salem as second class matter.

In Opinion No. 296 dated June 15, 1971, to the Honorable Robert S. Wiley, Prosecuting Attorney of Stone County (copy enclosed), we held that the phrase "in the county where located" contained in Section 493.053 refers to real estate as mentioned therein and not to the location of the newspaper. This being so, there is nothing further in this statute which would restrict publication of legal publications affecting the title to real estate in a county to a newspaper located and actually published within

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that county. In our opinion, the fact that the Ozark New Era Weekly newspaper is published in Dent County does not disqualify it from publishing legal publications affecting the title to real estate in Reynolds County under the provisions of Section 493.050.

Further, inasmuch as the phrase "in the county where located" refers to real estate and not to the location of the newspaper, there is nothing in Section 493.050 which would prevent the Ozark New Era Weekly newspaper from publishing public advertisements and orders of publication required by law. In fact, it seems clear from the language of this section that the legislature intended only that public advertisement and orders of publication be circulated in the area affected by said notices. To accomplish this, it is not necessary that the newspaper be actually published within the county.

However, it should be pointed out that certain statutes dealing with public advertisements and orders of publication required by law specifically forbid the publishing of such advertisements in newspapers published outside of the county involved. For example, Section 50.800, RSMo 1969, dealing with county financial statements, specifically requires that the financial statement of each county be published in some newspaper of general circulation published in the county, if there is one. In determining whether or not the Ozark New Era Weekly newspaper is qualified to publish a particular public advertisement or order of publication concerning Reynolds County, reference must be made to the particular statute which requires such publication.

Therefore, it is our view that Section 493.050, RSMo 1969, permits any newspaper to publish all public advertisements and orders of publication required by law in a county and all legal publications affecting title to real estate in a county, even though said newspaper is not actually printed and published in that county. However, the newspaper must be generally circulated in the county affected by the publications and meet the qualifications set forth in Section 493.050, RSMo 1969.

This does not apply to any public advertisement required by a statute to be published in a newspaper located within a particular county, such as Section 50.800, RSMo 1969.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 296  
6-15-71, Wiley

COUNTIES:  
SHERIFFS:  
COUNTY PROPERTY:

A county court of a fourth class county is authorized under Section 49.270, RSMo, to accept donations of real or personal property on the condition that such donations be used by the sheriff's office to perform general patrol duties throughout the county.

OPINION NO. 6

May 2, 1973

Honorable R. J. Gordon  
Prosecuting Attorney  
Hickory County  
Post Office Box 4  
Hermitage, Missouri 65668



Dear Mr. Gordon:

This opinion is in response to your request asking:

"May a Sheriff in a fourth class county accept money from any person, firm, or organization to reimburse the Sheriff for general patrol duty throughout the county? The reimbursement would be for reasonable mileage expense for the use of the Sheriff's personal vehicle in law enforcement work."

We find no statutory authority for the sheriff or his office to receive gifts. However, Section 49.270, RSMo, authorizes the county court to accept "or receive by donation any property, real or personal, for the use and benefit of the county."

We held in our enclosed Opinion No. 37, dated November 13, 1951, to Hamilton, that a county may accept title to a building and to equipment which building and equipment provide "hospital and clinic facilities," said property to be operated by the board of trustees of the county hospital in that county and to be a part of said hospital.

We believe that the same reasoning is applicable in this instance and that the county court is authorized to accept donations on the condition that such donations be used by the sheriff's office to enable the sheriff's office to perform general

Honorable R. J. Gordon

patrol duties throughout the county. However, conditions applicable to donations must not be against public policy or in any manner contrary to the laws of this state.

CONCLUSION

It is the opinion of this office that a county court of a fourth class county is authorized under Section 49.270, RSMo, to accept donations of real or personal property on the condition that such donations be used by the sheriff's office to perform general patrol duties throughout the county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 37  
11/13/51, Hamilton

INSURANCE:  
PENSIONS:  
RETIREMENT:  
CITIES, TOWNS & VILLAGES:

The Board of Trustees of the Firemen's and Police Pension Fund of the City of Jennings, Missouri, organized pursuant to Section 86.583, RSMo 1969, (1) cannot apply the

funds of such system toward the purchase of accidental death or permanent total disability insurance policies, but (2) can enter into a contract with an insurance company whereby the insurance company would hold the funds of the system in a "separate account" and would invest same as authorized by Section 376.309 (4), RSMo 1969.

OPINION NO. 7

June 19, 1973

Honorable James P. Mulvaney  
State Representative, District 61  
317 State Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Mulvaney:

This official opinion is issued in response to your inquiries addressed to the Attorney General's Office which follow:

"Does the Board of Trustees of the Firemen and Police Pension Fund of the City of Jennings, Missouri have authority to (1) purchase insurance against accidental death or permanent total disability on its covered employees, and (2) enter into a pension contract with a life insurance company whereby the funds of the pension plan would be invested in the insurance company's fixed income account which consists principally of investments in corporate bonds and mortgages?"

Section 86.583, RSMo 1969, permits certain municipalities to establish police and firemen's pension systems. We quote:

"Any municipality in any county of the first class, and any other municipality in this state which now contains or may hereafter contain not more than one hundred thousand inhabitants nor less than three thousand inhabitants as determined by the last preceding federal census is hereby authorized to

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provide for the pensioning of the salaried members of its organized police force or fire department and the widows and minor children of deceased members; . . ."

The remainder of Section 86.583 provides how such pension systems may be established. Your inquiry indicates that the City of Jennings has complied with this section to create its Police and Firemen's Pension Fund.

Section 86.590, RSMo 1969, authorizes the board of trustees of such a pension fund to invest the moneys thereof as follows:

"The board of trustees of police and firemen's pension systems, established under the provisions of section 86.583, may invest and reinvest the moneys of the system, and may hold, purchase, sell, assign, transfer or dispose of any of the securities and investments in which such moneys shall have been invested, as well as the proceeds of such investments and such moneys; except that such investment and reinvestments shall be subject to all the terms, conditions, limitations, and restrictions imposed by law upon life and casualty companies in the state of Missouri in making and disposing of their investments, except that the percentage limitations of subsection 2 of section 376.305, RSMo, shall not apply; and except that the system shall not increase its common stock investments by more than four percent of its assets in any one fiscal year after its first fiscal year."

Disposing of your second inquiry first, we shall answer the question whether the board of trustees of a firemen's and police pension fund may "enter into a pension contract with a life insurance company whereby the funds of the pension plan would be invested in the insurance company's fixed income account which consists principally of investments in corporate bonds and mortgages?"

Mr. Lloyd E. Eaker, Jennings city attorney and attorney for the Board of Trustees of the Police and Firemen's Retirement Fund of Jennings, has informed us that this particular question contemplates that the Board of Trustees would enter into an investment contract with an insurance company whereby the insurance company would hold and invest the funds made available under the contract pursuant to the "separate account" provisions of Section 376.309, RSMo 1969. That section defines a "separate account" of an insurance company as one



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". . . into which any amounts paid to or held by such company under applicable contracts are credited and the assets of which, subject to the provisions of this section, may be invested in such investments as shall be authorized by a resolution adopted by such company's board of directors. . . ."

All income, gains, or losses realized on such a separate account are credited to the account only without regard to other assets of the company. Likewise, such accounts are not chargeable with the liabilities arising out of other business the company conducts. Subsection 2 of that statute provides:

"Any domestic life insurance company may, after adoption of a resolution by its board of directors, establish one or more separate accounts, and may allocate to such account or accounts any amounts paid to or held by it which are to be applied under the terms of an individual or group contract to provide benefits payable in fixed or in variable dollar amounts or in both."

The language of the statute indicates that the primary purpose of "separate accounts" is to segregate from the other business of the insurance company investment contracts such as the pension investment contract which is the subject of your inquiry. Please note that subsection 3 of Section 376.309 would authorize an insurance company to give the members of a pension fund, such as the one in question, some control over the separate account which includes said fund. Subsection 4 provides how amounts included in such accounts can be invested. That subsection provides that:

"The amounts allocated to each such account and accumulations thereon may be invested and reinvested in any kind or type of investment authorized for life insurance companies by the statutes of this state, but the investment shall not be included or taken into account in applying the limitations established in sections 375.330, 376.300, 376.301, 376.303, 376.305, and 376.307 to the general investment account of any company; provided, that to the extent that the company's reserve liability with regard to (1) benefits guaranteed as to principal amount and duration, and (2) funds guaranteed as to principal amount or stated rate

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of interest, is maintained in any separate account a portion of the assets of such separate account at least equal to such reserve liability shall be, except as the superintendent of insurance might otherwise approve, invested in accordance with the laws of this state governing the general investment account of any company. As used herein, the expression 'general investment account' shall mean all of the funds, assets and investments of the company which are not allocated in a separate account. The provisions of section 376.170 relating to deposits for registered policies shall not be applicable to funds and investments allocated to separate accounts. No investment in the separate account or in the general investment account of a life insurance company shall be transferred by sale, exchange, substitution or otherwise from one account to another."

An investment in a "separate account", therefore, would comply with the generic requirement of Section 86.590, that the investment and reinvestment of pension funds be consistent with the legal requirements imposed upon the investments of life and casualty companies.

Any contract executed between the board of directors of the pension fund in question and an insurance company should include the 4% common stock increase limitation set forth in Section 86.590. This inclusion would be consistent with the establishment of a "fixed income account" which we assume refers to investments in debt securities paying a fixed rate of return which would not include investments in common stock. The contract should also include a provision that the trustees have the power to terminate the contract and resume custody of the funds or securities involved upon reasonable notice given to the insurance company. This provision would enable the trustees to retain the power to "invest and reinvest" the funds of the system as authorized by Section 86.590.

We conclude that the Board of Trustees of the Firemen's and Police Pension Fund of the City of Jennings, Missouri, can enter into a contract with an insurance company whereby the funds of the pension system would be held in a "separate account" of the insurance company and would be invested by the insurance company subject to the limitations and restrictions imposed upon by law upon the investments of life and casualty companies. The use of the "separate account" device is a reasonable and permissible exercise of the trustees' discretion and authority with regard to investments conferred by Section 86.590, RSMo 1969.



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Your first inquiry asks whether the board of trustees of a firemen's and police pension fund may "purchase insurance against accidental death or permanent total disability on its covered employees." The General Assembly of the state of Missouri, by means of Section 86.590, RSMo 1969, has expressly confined the authority of the board of trustees of the police and firemen's pension system, to the investment and reinvestment of the moneys of the system. The legislature has not authorized the purchase of insurance against accidental death or permanent total disability. We conclude that because of the specific requirement in Section 86.590, that the funds of a police and firemen's pension system be invested and reinvested, there has been granted no authority by law for the trustees of such a system to purchase insurance policies against accidental death or permanent total disability on its covered employees.

#### CONCLUSION

It is the opinion of this office that the Board of Trustees of the Firemen's and Police Pension Fund of the City of Jennings, Missouri, organized pursuant to Section 86.583, RSMo 1969, (1) cannot apply the funds of such system toward the purchase of accidental death or permanent total disability insurance policies, but (2) can enter into a contract with an insurance company whereby the insurance company would hold the funds of the system in a "separate account" and would invest same as authorized by Section 376.309(4), RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Michael L. Boicourt.

Very truly yours,



JOHN C. DANFORTH  
Attorney General

COMPENSATION:  
COUNTY RECORDER:

For the calendar year 1970 the recorder of deeds in a third class county which has a separate office of recorder of deeds and circuit clerk was entitled to receive the first \$4,750 in fees collected by his office as compensation and \$1,000 from the county treasury and his deputies were compensated out of the general revenue fund of the county without regard to the fees received by the office of recorder of deeds.

OPINION NO. 8

January 5, 1973

Honorable Christopher S. Bond  
State Auditor  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Bond:

This is in response to your request for an opinion on the following question:

"During the calendar year 1970, must the compensation of a Recorder of Deeds and his deputies, in third class counties where there are separate offices of Recorder and Circuit Clerk, be paid out of fees earned as provided in old Section 59.250, RSMo 1965 Supp., or must only the Recorder's salary be paid out of fees earned with compensation for the deputies being paid out of the general fund, as provided by Section 59.257, RSMo 1969."

Section 59.257, RSMo 1969 (Laws 1969, p. 120, section 1), became effective October 13, 1969. That section provides for the appointment and compensation of deputy recorders in counties of the third class wherein there is a separate circuit clerk and recorder. That section states:

". . . The deputies appointed . . . shall receive the salaries that are fixed by the recorder of deeds, with the approval of the county court, from the general revenue of the county. . . ."

Since the deputy recorder does not serve a definite term of office, the provisions of Article VII, Section 13 of the Constitution prohibiting an increase in compensation of county officers

Honorable Christopher S. Bond

has no application. Therefore, during the calendar year 1970, deputy recorders in third class counties which have separate offices of circuit clerk and recorder of deeds were compensated in accordance with the provisions of Section 59.257, RSMo--from the general revenue of the county without regard to the fees that were collected by the office of recorder of deeds.

The compensation of the recorder of deeds in such counties prior to October 13, 1969, was set by the provisions of Section 59.250, RSMo Supp. 1965. That section provided:

"1. The recorder of deeds in counties of the third class, wherein there is a separate circuit clerk and recorder, shall keep a full, true and faithful account of all fees of every kind received. He shall make a report thereof each year to the county court.

"2. All other fees over and above the sum of four thousand seven hundred fifty dollars for each year of his official term, seven hundred fifty dollars of which shall be compensation for the performance of duties imposed by section 137.117, RSMo, and four thousand dollars for other duties imposed by law, shall be paid into the county treasury after paying out of the fees and emoluments the amounts for deputies and assistants in his office that the county court deems necessary.

"3. In addition to the fees allowed to be retained by subsection 2 he shall receive as compensation for the performance of the duties imposed by section 59.255 one thousand dollars per year to be paid out of the county treasury."

In 1969 the amount of compensation and the method of compensating the recorder of deeds in third class counties was changed by Laws 1969, p. 120, section 1 (Section 50.334, RSMo 1969). Those recorders who were in office when the 1969 act was passed and whose term continued during the calendar year 1970 could not benefit from the increase in amount because of the prohibition against increasing compensation during the term of office found in Article VII, Section 13 of the Constitution. Article VII, Section 13 provides:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

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Therefore, such recorders were compensated at the rate fixed by Section 59.250, RSMo Supp. 1965. Under the compensation scheme set forth in Section 59.250, RSMo Supp. 1965, the recorder of deeds retained fees in the amount of \$4,750 and received an additional \$1,000 from the county treasury as compensation and paid all fees in excess of \$4,750 into the county treasury after deducting the amounts for deputies and assistants in his office. A careful reading of that section indicates that the deputies and assistants were to be paid out of fees in excess of \$4,750. Therefore, out of the fees the county recorder collected, the first \$4,750 was compensation to him and not to his deputies. When Section 59.257 was enacted, it provided for payment of deputies from the general revenue of the county. It did not increase the compensation of the recorder, but merely provided a method of compensating the deputies. Therefore, a county recorder who during the year 1970 was compensated in accordance with the provisions of Section 59.250, RSMo Supp. 1965, was entitled to receive the first \$4,750 of fees collected by his office and \$1,000 from the county treasury as compensation and his deputies during that year were entitled to receive compensation as approved by the county court in accordance with the provisions of Section 59.257, RSMo 1969.

#### CONCLUSION

It is the opinion of this office that for the calendar year 1970 the recorder of deeds in a third class county which has a separate office of recorder of deeds and circuit clerk was entitled to receive the first \$4,750 in fees collected by his office as compensation and \$1,000 from the county treasury and his deputies were compensated out of the general revenue fund of the county without regard to the fees received by the office of recorder of deeds.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

Yours very truly,



JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

February 23, 1973

OPINION LETTER NO. 12

Herbert R. Domke, M.D.  
Director, Division of Health  
Broadway State Office Building  
Jefferson City, Missouri 65101

Dear Dr. Domke:

This letter is in response to your request for an opinion which asks:

"Does a label bearing the Federally registered trade mark 'NO-CAL' and a statement containing the actual caloric content per ounce when used on a bottle of a beverage containing as many as 4, 8 or 12 calories per 16 ounce bottle violate provisions of the Non-Alcoholic Drink Law (Sections 196.125 - 196.145 RSMo)?"

The statutes to which you refer include a definition of "non-alcoholic drink" as follows:

"That the term 'nonalcoholic drink', as used herein, shall include carbonated beverages of all flavors, sarsaparilla, ginger ale, soda water of all flavors, lemonade, orangeade, root beer, grape juice, and all other non-intoxicating drinks." Section 196.125, RSMo

The ingredient list on the label of the NO-CAL beverage indicates that it is a carbonated-flavored beverage; furthermore, the absence of an alcoholic content percentage brings the NO-CAL beverage within the scope of that part of the definition referring to "all other nonintoxicating drinks."

Herbert R. Domke, M.D.

Another section provides that nonalcoholic drinks shall not be misbranded and reads as follows:

"That it shall be unlawful for any person, firm or corporate body, by himself, herself, itself or themselves, or by his, her, its or their agents, servants or employees, to manufacture, sell, offer for sale, expose for sale, or have in possession with intent to sell, any article of nonalcoholic drink which is adulterated or misbranded, within the meaning of sections 196.125 to 196.145." Section 196.130, RSMo

Nonalcoholic drinks are deemed misbranded under the following conditions:

"That, for the purpose of sections 196.125 to 196.145, a nonalcoholic drink shall be deemed to be misbranded:

\* \* \*

(2) If it is labeled or branded or tagged so as to deceive or mislead the purchaser;

\* \* \*

(5) If the bottle or receptacle containing it, or its label, shall bear any statement, design or device, regarding the ingredients or the substance contained therein, which statement, design or device shall be false or misleading in any particular; provided, that any nonalcoholic drink which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded under the following conditions:

(a) In the case of mixtures or compounds which may be now, or from time to time hereafter, known as nonalcoholic beverages under their own distinctive names, and not an imitation of, or offered for sale under, the name of another article; . . ." Section 196.140(2) and (5), RSMo

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It appears that your inquiry concerns the question whether the name "NO-CAL" constitutes a "label, brand or tag that deceives or misleads the purchaser," within the scope of subsection 2 of Section 196.140 above. An alternative consideration involves whether the NO-CAL beverage bears a ". . . statement, design or device, regarding the ingredients or the substance contained therein, which statement, design or device shall be false or misleading in any particular; . . ." as provided in subsection 5 of Section 196.140. And finally, consideration must be given to the proviso of subsection 5 that those nonalcoholic drinks not containing added poisonous or deleterious substances shall not be deemed misbranded in the case of mixtures or compounds that are known under their own "distinctive names." Relying on the list of ingredients displayed on the NO-CAL label, the beverage does not appear to contain "poisonous or deleterious" additives, and therefore the proviso of subsection 5 may apply. Whether "NO-CAL," therefore, constitutes a "distinctive name" within the meaning of said proviso may be determinative of whether a manufacturer or vendor of that product is liable for violation of the law under Section 196.145.

We also note that the provisions relating to nonalcoholic drinks (Sections 196.125 through 196.145, RSMo) are not the exclusive sections pertaining to misbranding of food under Missouri law. Section 196.010, RSMo, defines terms for the purposes of the Food and Drug Law, Sections 196.010 to 196.120, RSMo. Among these definitions is the term "food" which is defined as follows:

"The term 'food' means articles used for food or drink for man or other animals, chewing gum, and articles used for components of any such article;" Section 196.010(7), RSMo

A nonalcoholic drink is included in this definition. State v. Lief, 154 S.W. 1133, 1134 (Mo. 1913).

Food is deemed to be misbranded under the following circumstances:

"If its labeling is false or misleading in any particular;" Section 196.075(1), RSMo

It is helpful to consider the case law interpreting the provisions of the original Federal Food and Drug Act, since the Missouri Food and Drug Law is similar in purpose and often identical in its provisions. For instance, under Section 8 of the 1906 Federal Pure Food Act, the term "misbranded" is defined as follows:

"That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food,



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or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, . . ."

34 Statutes at Large 768, Chapter 3915, Section 8

Clearly, the 1906 Pure Food Act was the source of our misbranding law; because of that derivation, cases interpreting the Federal statute are valuable in applying the Missouri statute.

An early statement by the United States Supreme Court concerning the purposes of the Federal Act was as follows:

"The statute upon its face shows, that the primary purpose of Congress was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated foods. The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality. . . ."

United States v. Lexington Mill & Elevator Company, 232 U.S. 399, 409, 58 L.Ed. 658, 662 (1914)

A later federal court spoke thusly as to the meaning of the misbranding provisions of the Federal Act:

". . . The [Federal Food, Drug and Cosmetic] Act was not designed to protect the critical consumer; rather its purpose is--'to protect the public, the vast multitude which includes the ignorant, the unthinking, and the credulous who, when making a purchase, do not stop to analyze.' . . ."

United States v. 30 Cases, etc., 93 F.Supp. 764, 769 (D.C. Ia. 1950)

In determining whether an article is misbranded under Section 196.140, RSMo, we must consider first if "it is labeled, branded, or tagged so as to deceive or mislead the purchaser." In attempting to identify what standard to apply in order to determine whether a product deceives or misleads, the court in United States v. 88 Cases, etc., 187 F.2d 967, 971 (3rd Cir. 1951) stated as follows:

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"The correct standard was the reaction of the ordinary consumer under such circumstances as attended retail distribution of this product. When a statute leaves such a matter as this without specification, the normal inference is that the legislature contemplated the reaction of the ordinary person who is neither savant nor dolt, who lacks special competency with reference to the matter at hand but has and exercises a normal measure of the layman's common sense and judgment. . . ."

It must be conceded that the Federal and Missouri statutes provide little flexibility in interpreting "misbranding" by requiring only that the label be "false or misleading in any particular" (emphasis ours). Section 196.140(5), RSMo, 21 U.S.C.A., Section 334. In attempting to permit some flexibility in the interpretation of this provision, the court in United States v. Article of Food Consisting of 432 Cartons, 292 F.Supp. 839, 841 (D.C. N.Y. 1968) stated:

"The issue of whether a label is false or misleading may not be resolved by fragmentizing it, or isolating statements claimed to be false from the label in its entirety, since such statements may not be deemed misleading when read in the light of the label as a whole. . . ."

However, the court commented that even when the actual ingredients of a product are listed on the label, they may nonetheless be misleading since "a true statement will not necessarily cure or neutralize a false one contained in the label." Id. at 841.

Addressing a situation much like the present one, a federal judge expressed the following views on the relationship of misleading large print on a food label to truthful small print on the same label:

"Conceding that the product is not deleterious to health, it certainly is not orange juice sweetened in the ordinary meaning of those words. It might as well be called sugar acidulated. The words 'Orange Juice Sweetened' are in large type. Other parts of the label fairly describing the ingredients are in very much smaller type. It is not probable that a purchaser of a drink made from the compound would notice the fine print. I consider the

Herbert R. Domke, M.D.

label tends to deceive and mislead the ultimate purchaser and therefore the article is misbranded within the prohibition of the Food and Drugs Act." United States v. Nesbitt Fruit Products, 96 F.2d 972, 973 (5th Cir. 1938) (dissenting opinion)

Very recently, a federal court concluded that "All Meat" labels on frankfurters containing 15% nonmeat constituted misbranding under a statute similar in its terms to the Pure Food and Drug Act:

". . . In applying the 'ordinary meaning' test to the word 'all', it is clear when that adjective is used on a label with the word 'meat', the common understanding is that it describes a substance that is totally and entirely meat. The application of the 'All Meat' label to frankfurters that are 15 percent nonmeat is a contradiction in terms and is misleading within the meaning of [the Wholesome Meat Act]. . . ." Federation of Homemakers v. Hardin, 328 F.Supp. 181, 184-185 (D.C. D.C. 1971)

We believe that there can be little doubt that the word NO-CAL to the ordinary consumer means "no calories," especially in connection with the words "SUGAR FREE!" displayed in bold letters above the brand name. Furthermore, on each side of the crown that appears to be part of the trademark, the legend "NO CYCLAMATES, NO SUGAR" appears. Clearly, the purchaser of this product is encouraged to conclude that the beverage contains no calories. However, on the bottom of the NO-CAL black cherry label is printed the following statement, in type considerably smaller than the various words already described:

"No proteins, no fats, no carbohydrates and approx. 1/2 of a calorie per ounce."

The contradiction on the label is evident and confusion will surely result. Accordingly, it is our opinion that this label is misleading and constitutes a misbrand under our Food and Drug and Nonalcoholic Beverage Laws.

It remains to be considered whether NO-CAL is saved from misbranding by the "distinctive name" exception, to wit:

". . . provided, that any nonalcoholic drink which does not contain any added poisonous or deleterious ingredients shall not be deemed

Herbert R. Domke, M.D.

to be adulterated or misbranded under the following conditions:

(a) In the case of mixtures or compounds which may be now, or from time to time hereafter, known as nonalcoholic beverages under their own distinctive names, and not an imitation of, or offered for sale under the name of another article; . . ." Section 196.140(5), RSMo

This proviso makes it clear that a statement, design or device on a label will not be deemed misbranded if it amounts to a "distinctive name." Although the brand "NO-CAL" has been in use for approximately twenty years, there is some authority from which we can infer that it is not a "distinctive name" within the purview of Section 196.140(5). Referring once again to interpretations of the Federal Pure Food Act, the Supreme Court in United States v. Forty Barrels, 241 U.S. 265, 36 S.Ct. 573, 60 L.Ed. 995 (1916) considered whether Coca Cola was a distinctive name under a federal statute identical to Section 196.140(5), RSMo. In order for a name to be distinctive, the court observed that the name, to public knowledge, must cease to have its original significance, and the public must recognize that the words used do not actually describe the contents of the bottle. Until such knowledge can be attributed to the public, "the name would naturally continue to be descriptive in its original sense." 60 L.Ed. at 1005. Further, the court stated:

" . . . A mixture or compound may have a name descriptive of its ingredients or an arbitrary name. The latter (if not already appropriated) being arbitrary, designates the particular product. Names, however, which are merely descriptive of ingredients, are not primarily distinctive names save as they appropriately describe the compound with such ingredients. To call the compound by a name descriptive of ingredients which are not present is not to give it 'its own distinctive name,'--which distinguishes it from other compounds,--but to give it the name of different compound. That, in our judgment, is not protected by the proviso, unless the name has achieved a secondary significance as descriptive of a product known to be destitute of the ingredients indicated by its primary meaning." Id. at 1006

We are, therefore, of the opinion that the label NO-CAL is not a "distinctive name" within the exception to misbranding set out in Section 196.140(5), RSMo.

Herbert R. Domke, M.D.

Therefore, it is our opinion that the label bearing the brand name "NO-CAL" on a bottle of carbonated nonalcoholic beverage constitutes misbranding within the meaning of the Missouri Food and Drug and Nonalcoholic Drink Laws even though there appears in small print elsewhere on the label the actual number of calories contained in the beverage.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Danforth" written in a continuous script.

JOHN C. DANFORTH  
Attorney General

January 30, 1973

OPINION LETTER NO. 14  
Answer by letter-Wood

Mr. Joseph Jaeger, Jr.  
Director of Parks  
State Park Board  
Post Office Box 176  
Jefferson City, Missouri 65101



Dear Mr. Jaeger:

You have requested my official legal opinion on the following question:

"Does the Missouri State Park Board have the legal authority to lease certain lands under its jurisdiction and improvements thereon to a not-for-profit corporation on a long-term basis, i.e., 25 years with a 25-year option?"

You advise us that the Lake of the Ozarks Yachting Association, Inc. has approached the Park Board with a request to so lease the land and buildings known as the Camp Pa He Tsi area of Lake of the Ozarks State Park. It is our understanding that such lease would provide for periodic rental payments representing fair market value for the use of the land, transfer to the lessor of ownership of all improvements constructed by the lessee during the lease at the expiration or termination thereof, and exclusive use of the leased premises by the lessee during the currency of the lease subject only to reasonable supervision and inspection by the lessor.

The Lake of the Ozarks Yachting Association, Inc. was incorporated by pro forma decree of the circuit court of Miller County, Missouri, on or about June 24, 1953, pursuant to the law relating to Religious and Charitable Associations, Chapter 352, RSMo. The objects and purposes of the corporation, as stated in its articles of association, are:

Mr. Joseph Jaeger, Jr.

"1. To promote safety and to increase respect for Pilot Rules on the Lake of the Ozarks.

"2. To promote and encourage the racing and cruising of yachts and motor boats and to develop interest in boating in general upon the Lake of the Ozarks.

"3. To establish and enforce uniform rules for the government of all Association sponsored races, cruises and other activities in which two or more craft shall compete or take part.

"4. To instruct and educate members of the Association and the general public in the operation of boats and other watercraft upon the Lake of the Ozarks.

"5. To promote and carry on activities which shall be beneficial to yachting and to the development of recreational activities upon the Lake of the Ozarks."

In our opinion, the only statutory basis for the proposed lease would be that contained in the following statute:

"2. The park board may award by contract to any suitable person, persons, corporation or association the right to construct, establish and operate public services, privileges, conveniences and facilities on any land, site or object under its control for a period not to exceed twenty-five years with a renewal option, and may supervise and regulate any and all charges and fees of operations by private enterprise for supplying services and operating facilities on state park areas."  
(emphasis ours) Section 253.080(2), RSMo

We believe this statute authorizes the Park Board to enter into agreements for the operation by private corporations of park lands and improvements only so long as such remain open to and accessible to the general public. It does not, in our opinion, authorize the Park Board to grant leases of park lands to private corporations so that such may be used exclusively by the private corporation and its invitees. The Lake of the Ozarks State Park



Mr. Joseph Jaeger, Jr.

is owned by the state of Missouri pursuant to a conveyance from the United States in 1946 based upon an Act of Congress dated June 6, 1942 (56 Stat. 326; 16 U.S.C.A. §459r). This Act of Congress, in providing for the conveyance of "recreational demonstration projects" to the various states, stipulated that the grantee states "use the property exclusively for public park, recreational, and conservation purposes." (56 Stat. 327; 16 U.S.C.A. §459t; emphasis ours). The ensuing deed executed by the Secretary of the Interior expressly conditioned the conveyance upon the state of Missouri's use of the property "exclusively for public park, recreational, and conservation purposes." (emphasis ours).

We have found this definition of the term "public park":

" . . . But, in the idea of a public park is comprehended more, than a use, either occasional or limited by years, or susceptible of coexistence with a private right capable of concurrent exercise. The words suggest more than an open extensive area of land, to be passed over or but temporarily occupied by the public, and on which any private person may still do acts of ownership. To create a public park an extensive area is needed; but the area must be improved, and in various processes, alterative and subversive of natural formation, must much money be absorbed, and many years must go by before it is complete. And so costly, so extensive, so peculiar in character, and so undisturbed by interference, must be these processes and the results of them, as that there is need of permanency and exclusiveness of public possession and control, as against the exercise of any private right therein. . . ." The Brooklyn Park Commissioners v. Armstrong, 45 N.Y. 234, 240 (N.Y. 1871)

As thus understood, we do not feel that the state of Missouri could fulfill its commitment to use the Lake of the Ozarks Park exclusively for "public park" purposes by leasing a portion of it for up to 50 years to a private corporation.

The courts of other states have ruled upon questions very similar to the one you present us. In one such decision, the Nebraska Supreme court held invalid a city's agreement granting a private association the exclusive use and control of the city owned race track, grandstand, and accompanying grounds for a period of 25 years. The court observed:

Mr. Joseph Jaeger, Jr.

"If a race track, for holding race-meets, is a proper improvement for a public park, it must be under the control of the park commissioners of the city. The city had the right to acquire the lands for a public park. When so acquired it must be used for a public park, and the public must be allowed access thereto, subject only to rules and regulations made by the board of park commissioners and ordinances of the city. Neither the park commissioners nor the city have authority to delegate to, or share with, appellees herein, or any person, the making of rules and regulations governing the control of its public park. Neither the park commissioners nor the city had the power to grant to appellee the exclusive use and control of said race track.

\* \* \*

"The city had power to grant to appellee a license or concession to hold in said park race-meets, for short periods of time, for the entertainment of the public, the same as it might grant a concession for providing refreshments or any other amusement for the public. . . . A city has no power to grant a concession in its public park or public property without reserving to its proper officers the power of supervision and control of the use of the park for the benefit of the public." Nebraska City v. Nebraska City Speed & Fair Ass'n., 186 N.W. 374, 376-377 (Neb. 1922)

An Illinois Court of Appeals struck down a lease granted by the Chicago Park District to a not-for-profit corporation organized to promote the sport of shooting and to conduct and maintain a shooting club.

"The lease granted to plaintiff what was tantamount to an exclusive use of a portion of a public park, since it could under the terms thereof effectually bar the general public from the use of its club house and its shooting facilities. . . ." Lincoln Park Traps v. Chicago Park Dist., 55 N.E.2d 173, 177 (Ill. App. 1944)

Mr. Joseph Jaeger, Jr.

The Illinois court also observed that the lease was invalid because it "granted special privileges to the members of a private club."

The Kentucky Court of Appeals held that the city of Ashland could not contract with the Ashland Baseball Club, which controlled professional, high school, American Legion, and Elks baseball teams, so as to give the club the "exclusive use" of an athletic field located in the city park:

"The grant of public power and right imposes a corresponding public duty and responsibility. Official dominion and discretion may not be surrendered, nor public functions delegated, in whole or in part, to another person who is not answerable to the people. . . .

"It seems to us that the proposed contracts would in effect give to the various clubs the right and power to exclude the general public from the use of a substantial part of the park for an indefinite, although extended period of time. This would not be consistent with its free public use. The Board would surrender its sole and exclusive control of the management of this part of the public property. Its dominion and administration would be less than absolute. . . ." Board of Park Com'rs. of Ashland v. Shanklin, 199 S.W.2d 721, 723-724 (Ky.App. 1947)

In discussing a similar case involving the city of Louisville Board of Park Commissioners, the Kentucky court also observed that the statutes governing these boards ". . . manifest the legislative intent to lodge in both bodies as trustees for the people the exclusive custody and control of their properties."

And, finally, the Supreme Court of Georgia held that if a city acquired and held property for park purposes, it did so in its governmental capacity and therefore could not lease the property to a private corporation:

". . . Nor could the operation of the facility by the plaintiff be construed as a public use by a showing that the plaintiff is a non-profit corporation which may devote any profits from its operation to charitable purposes, or that benefits may flow to the city in carrying out an ultra vires contract made in its

Mr. Joseph Jaeger, Jr.

behalf. . . . Although the lease provided that at least one day a week must be left open for the use of the general public nevertheless, those who might wish to use it at other times must use it subject to the uses and rules prescribed by the plaintiff private corporation or else be denied its use."  
Jonesboro Area Athletic Association v. Dickson,  
181 S.E.2d 852, 856 (Ga. 1971)

Accordingly, we are of the opinion that the Missouri State Park Board is not authorized to enter into the proposed lease of a portion of Lake of the Ozarks State Park to the Lake of the Ozarks Yachting Association, Inc.

Yours very truly,

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH  
ATTORNEY GENERAL

February 7, 1973

OPINION LETTER NO. 15

Honorable Charles M. LeCompt  
Prosecuting Attorney  
Greene County, Courthouse  
Springfield, Missouri 65802

Dear Mr. LeCompt:

This letter is in response to a request by Mr. Dee Wampler, your predecessor, asking:

"For what length of time must an official court reporter preserve official notes taken in past court proceedings?"

Section 485.050, RSMo 1969, provides:

"It shall be the duty of the official court reporter so appointed . . . to preserve all official notes taken in said court for future use or reference, and to furnish to any person or persons a transcript of all or any part of said evidence or oral proceedings upon the payment to him of the fee herein provided." (Emphasis supplied)

We find no reported cases in Missouri respecting the duration of the preservation of official court notes. We find no authority for the destruction of such notes and therefore we are of the opinion that such notes must be preserved indefinitely.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

CIVIL DEFENSE: The obligation to provide emergency  
CITIES, TOWNS & VILLAGES: planning coordination applies to  
CONSTITUTIONAL CHARTER CITIES: all political subdivisions in Mis-  
souri, including constitutional  
charter cities. Insofar as Section 44.080 designates the execu-  
tive officer of a political subdivision as the person responsible  
for civil defense planning, it is inapplicable to constitutional  
charter cities. Each charter city is entitled to designate the  
person responsible for supervision of its civil defense obligation.  
With regard to the city of Springfield, the terms of its Charter  
presently would appear to empower only the city manager to super-  
vise or carry out these functions, but other provision could be  
made by amending the Charter.

OPINION NO. 17

March 13, 1973

Major General L. B. Adams  
Adjutant General  
Post Office Box 116  
Jefferson City, Missouri 65101



Dear General Adams:

This is in response to your opinion request which stated the  
following questions:

"Do Missouri statutes relating to disasters  
or emergencies, primarily Chapter 44 RSMo.,  
apply to the City of Springfield and other  
cities which operate under a City Charter?

"Is the Mayor or City Manager the 'executive  
official' and which would become the Director  
of Emergency Operations (See State Disaster  
Operations Plan) upon declaration of an emer-  
gency by the Governor?"

Your first question concerns the application of the emergency  
planning provisions found in Chapter 44 of the Missouri Statutes  
to cities having a charter form of government pursuant to Article  
VI, Section 19 of the Missouri Constitution.

Section 44.080, RSMo 1969, provides in part as follows:

"1. Each political subdivision of this state  
shall establish a local organization for disas-  
ter planning in accordance with the state sur-  
vival plan and program. . . ."

Major General L. B. Adams

The answer to your first question will depend on whether a constitutional charter city is a political subdivision within the meaning of Section 44.080. In this regard, Section 44.010, RSMo 1969, defines political subdivision as "any county or city, town or village, or any fire district created by law."

Article VI, Section 19 of the Missouri Constitution provides the manner in which city government by charter can be established for any city with more than five thousand inhabitants. Section 19 (a) states the powers of such constitutional charter cities as follows:

"Any city which adopts or had adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the Constitution of this State and are not limited or denied either by the charter adopted or by statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law."

Under this provision, Springfield and other constitutional charter cities have the responsibilities imposed upon cities by statute. These responsibilities include those conferred upon political subdivisions under Chapter 44 of the Missouri Statutes, which defines political subdivision to include cities. We conclude, therefore, that pursuant to Section 44.080, each political subdivision, including constitutional charter cities, is required to establish a local disaster planning organization.

Your second question asks whether the mayor or the city manager is the "executive officer" responsible for coordinating civil defense efforts in Springfield. Section 44.010(7), RSMo 1969, defines executive officer of a political subdivision as ". . . the county court or county supervisor or the mayor or other manager of the executive affairs of any city, town, village or fire protection district." The responsibilities of that executive officer are described in Section 44.080, RSMo 1969, which provides as follows:

"1. Each political subdivision of this state shall establish a local organization for disaster planning in accordance with the state survival plan and program. The executive officer of the political subdivision shall appoint a coordinator who shall have direct responsibility for the organization, administration and operation of the local disaster



Major General L. B. Adams

planning for civil defense, subject to the direction and control of the executive officer or governing body. Each local organization for disaster planning shall be responsible for the performance of civil defense functions within the territorial limits of its political subdivision, and may conduct these functions outside of the territorial limits as may be required pursuant to the provisions of this law.

"2. In carrying out the provisions of this law, each political subdivision may:

(1) Appropriate and expend funds, make contracts, obtain and distribute equipment, materials, and supplies for civil defense purposes; provide for the health and safety of persons, including emergency assistance to victims of any enemy attack, the safety of property; and direct and coordinate the development of disaster plans and programs in accordance with the policies and plans of the federal and state disaster and emergency planning;

(2) Appoint, provide, or remove rescue teams, auxiliary fire and police personnel and other emergency operations teams, units or personnel who may serve without compensation;

(3) In the event of enemy attack, waive the provisions of statutes requiring advertisement for bids for the performance of public work or entering into contracts."

In determining which officeholder is the executive required to carry out these responsibilities, we must consider the effect of Article VI, Section 22 of the Missouri Constitution, which provides as follows:

"No law shall be enacted creating or fixing the powers, duties or compensation of any municipal office or employment, for any city framing or adopting its own charter under this or any previous Constitution, and all such offices or employments heretofore created shall cease at the end of the terms of any present incumbents."

Major General L. B. Adams

It is the opinion of this office that application of Article VI, Section 22 precludes the legislature from designating which city official of a constitutional charter government is responsible for carrying out the obligations imposed by Section 44.080. This conclusion is supported by the holding in State ex rel. Burke v. Cervantes, 423 S.W.2d 791 (Mo. 1968). Although the establishment of a civil defense network is a matter of statewide concern, the Missouri constitutional provision limiting interference with home-rule municipalities prevents the legislature from designating which constitutional charter city officer is charged with the local civil defense responsibility. Springfield, as a constitutional charter city, is entitled to determine under whose supervision its civil defense obligation will be met.

Under the present Springfield Charter, it would appear that the city manager is the only officer who could designate a local civil defense coordinator by virtue of the various provisions describing his duties and powers. Section 1.2 of the Springfield Charter provides that the city manager is the official "who shall execute the laws and administer the government of the city." His duties are listed in Section 3.3 of the Charter as follows:

"The city manager shall be the chief executive and administrative officer of the city and shall be responsible to the council for the proper administrative [sic] of all of the city's affairs. . . ."

This section also enumerates the powers of the city manager, which include, in pertinent part, the following:

- (1) to appoint and remove officers and employees of the city;
- (2) to prescribe powers and duties of officers and employees not otherwise described in the charter or city ordinances.

A superficial examination of the Springfield Charter might indicate that the mayor was contemplated by the framers of the Charter as the official who should be charged with the civil defense responsibility; Section 2.6 provides in part as follows:

". . . He shall preside at all meetings of the council and shall be recognized as head of the city government for all legal and ceremonial purposes and by the governor for purposes of Military Law. . . ."

Major General L. B. Adams

But the mayor's duties, other than those required of each council member, are expressly non-administrative according to Section 2.6; he is, however, recognized as head of the city government for legal and ceremonial purposes. In addition, he is to be recognized by the governor as the head of city government "for the purposes of Military Law." Although military law might be construed to include civil defense activities, the present provisions of the Springfield Charter, read in light of Chapter 44, preclude that construction.

Section 44.010(1) defines civil defense as ". . . government at all levels performing emergency functions, other than functions for which military forces are primarily responsible." Military forces are governed by military law, and ". . . Military law is enacted for the organization, government, and discipline of troops and applies only to persons in military service. . . ." Bishop v. Vandercook, 200 N.W. 278, 280 (Mich. 1924). It is clear that functions for which the military is primarily responsible are not within the civil defense activities contemplated by Chapter 44. Hence, the Springfield Charter recognizing the mayor as head of city government for the purposes of military law does not impose on the mayor any responsibilities associated with civil defense.

Moreover, Section 3.3 of the Springfield Charter describes the city manager as the chief executive and administrative officer of the city, responsible to the council for the conduct of city affairs. Section 2.6 expressly provides that the mayor "shall have no regular administrative duties." In addition, Section 44.080, RSMo 1969, requires that each political subdivision have a coordinator responsible for local disaster planning. Only the city manager is empowered to administer the local civil defense program by virtue of his broad supervisory functions and the grant of exclusive power under Charter Section 3.3 to appoint and remove city officers and employees. Furthermore, Section 2.8 of the Springfield Charter expressly prohibits the city council or individual members thereof from directing or requesting the appointment or removal of any person from office or employment in the city. Indeed, the consequence of violating this provision is forfeiture of office. We, therefore, conclude that the Springfield Charter in its present form empowers only the city manager to administer or establish the local civil defense program.

#### CONCLUSION

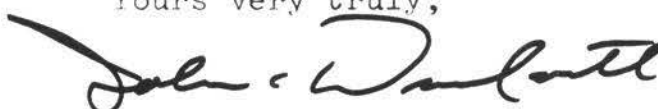
It is the opinion of this office that the obligation to provide emergency planning coordination applies to all political subdivisions in Missouri, including constitutional charter cities. Insofar as Section 44.080 designates the executive officer of a political subdivision as the person responsible for civil defense planning, it is inapplicable to constitutional charter cities.

Major General L. B. Adams

Each charter city is entitled to designate the person responsible for supervision of its civil defense obligation. With regard to the city of Springfield, the terms of its Charter presently would appear to empower only the city manager to supervise or carry out these functions, but other provision could be made by amending the Charter.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Karen Harper.

Yours very truly,

A handwritten signature in black ink, appearing to read "John C. Danforth", written in a cursive style.

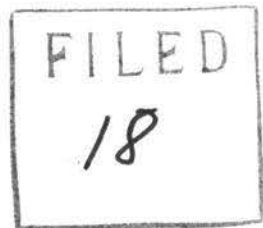
JOHN C. DANFORTH  
Attorney General

May 18, 1973

OPINION LETTER NO. 18

Answer by Letter - Almstedt

Honorable Robert O. Snyder  
State Representative, District 95  
204 State Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Snyder:

This letter is in response to your request for an opinion on whether independent or free-lance "court reporters" may lawfully charge litigants fees in excess of the limits established by Section 492.590, RSMo 1969, when the latter section is applicable.

You mention in your request that:

"Court reporters in the St. Louis and St. Louis County area as a matter of practice have been establishing their own fee schedules for charges to litigants without regard to the fee limits established in Section 492.590, Missouri Revised Statutes.

"A complaint about charges made in excess of the statutory limits was made to the Bar Association of St. Louis, after which a chairman of one of the Bar Association's committees met with the president of the Court Reporters Association who stated that it was the belief of the members of the association that the statutory limits were not applicable to their charges."

For your information, Section 492.590, RSMo 1959 has been substantially adopted by Missouri Supreme Court Rule 57.46.

Honorable Robert O. Snyder

There has been no change in the law, however, since 1951 when R. S. 1939, Section 1970 was amended to read as it presently does under Missouri Supreme Court Rule 57.46 with the exception that the latter rule incorporates the cost and expense prescriptions of Section 492.590(2), RSMo 1969. Section 492.590(2), RSMo is not in conflict with the Missouri Supreme Court Rules under the proviso of Rule 41.04.

Supreme Court Rule 57.46(b) provides that:

"The costs and expenses [of taking depositions, together with the fees of recording and copying the same] so taxed shall be certified by the stenographer or shorthand reporter taking the same and shall be in the amount fixed by statute."

Your opinion request seeks this office's construction of Missouri Supreme Court Rule 57.46 and such rule's incorporation of subsection 2 of Section 492.590, RSMo.

This office is without assistance from case authority to ascertain and thereby give effect to the legislative intent expressed in Section 492.590, RSMo 1959 and 1969 and Missouri Supreme Court Rule 57.46. However, the legal maxim which provides that where the language of a statute is plain and unambiguous, that there is no occasion for construction and the statute must be given its effect according to its plain and obvious meaning, affords some guidance to this office.

Subsection b of Supreme Court Rule 57.46 is plain in its reading with no ambiguous words or phrases employed. It is our construction of Supreme Court Rule 57.46 that the intent of the legislature is that the cost and expenses incident to the taking of depositions, together with the fees and copying of the same, if designated to be taxed against a named party to a lawsuit as court costs, are prescribed in their amounts by the statutory limits fixed in subsection 2 of Section 492.590, RSMo.

It is the opinion of this office that costs and expenses of taking depositions, together with the fees of recording and copying the same, designated to be taxed as court costs are prescribed according to the amounts fixed by subsection 2 of Section 492.590, RSMo 1969.

Very truly yours,

JOHN C. DANFORTH  
Attorney General





JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

January 4, 1973

OPINION LETTER NO. 20

Honorable Max Patten  
Prosecuting Attorney  
Jasper County  
1313 Crest  
Joplin, Missouri 64801

Dear Mr. Patten:

This is in response to the request of your predecessor for an opinion as to whether or not a taxpayer who has disputed his property tax statement for the year 1970 and refused to pay any tax on said property prior to the time said tax became delinquent should be required to pay any penalty and/or interest on the tax finally levied following protracted litigation.

It is our understanding that the facts involved are as follows:

A taxpayer in Jasper County disputed the assessment value set upon his real property for the taxable year 1970. On October 30, 1970, following administrative review, the State Tax Commission set an assessment value of \$21,000 on the taxpayer's property and certified this amount to the county. This figure was placed on the county's tax book prior to October 31, 1970, and turned over to the county collector for collection. Subsequently, the county collector notified the taxpayer that his 1970 tax, based upon the State Tax Commission's decision with regard to assessment, was \$1,073.10, said tax to be paid on or before December 31, 1970. In the meantime, the taxpayer determined to contest the assessed valuation placed upon his property by the State Tax Commission and, accordingly, filed a petition in the Circuit



Honorable Max Patten

Court of Jasper County on November 27, 1970. However, no stay order preventing the Tax Commission from certifying its findings to the county or the county from placing these figures in the hands of the county collector was ever issued. On January 1, 1971, the delinquent date for the payment of 1970 property taxes, no payment in any amount was tendered to the county collector. On October 21, 1971, the Circuit Court of Jasper County set aside the assessment placed upon taxpayer's property by the State Tax Commission and ordered that the cause be remanded to the Tax Commission for a new hearing. In March, 1972, the State Tax Commission issued new findings setting the assessed value at \$11,850. Based upon the new findings, the taxpayer was notified in April that a tax of \$610.29 was being levied against him for 1970 property taxes by use of a supplemental tax book prepared under the provisions of Section 137.300, RSMo 1969, and that interest and penalties in the amount of \$85.44 and \$12.21 respectively were being assessed as of the delinquent date, January 1, 1971. To date, the taxpayer has refused to pay the penalties and interest as determined by the county collector.

In our view, the taxpayer is not entitled to escape the penalty and interest provisions of the statutes. As stated in *American Airlines, Inc. v. City of St. Louis*, 368 S.W.2d 161, 167 (Mo. 1963), the general rule of taxation is that, in the absence of statutory authorization, courts have no power to relieve delinquent taxpayers from penalties imposed by statute. This principle is not affected by the fact that the taxpayer would suffer hardship by reason of the penalties; nor it is affected by the fact that the taxpayer is contesting in good faith the validity of the tax levied, and that the penalties have largely accumulated while the litigation is pending respecting the validity of the tax. In an earlier opinion of this office, Opinion No. 14, issued October 31, 1957, to the Honorable Clay Cantwell, the Prosecuting Attorney of Taney County (copy enclosed), this office held that real estate taxes, once levied, are subject to the delinquency provisions of the law if they remain unpaid on the delinquent date.

In the factual situation contained in your request, it is obvious that a tax was levied upon the taxpayer for real property contained in Jasper County for the year 1970. Under the law, this tax became delinquent on January 1, 1971. Section 140.010, RSMo

Honorable Max Patten

1969. The taxpayer, although continuing to contest the assessment figure placed upon his property by the State Tax Commission, failed to secure a stay of the levy against him in circuit court. Neither did he avail himself of the provisions of Section 139.031, RSMo 1969, and tender payment of the disputed tax under protest. Therefore, the tax, even though not finally determined until April, 1972, must be considered delinquent for tax purposes as of January 1, 1971. Under the provisions of Section 139.100, RSMo 1969, the collector must collect penalties and interest for this delinquency.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 14  
10-31-57, Cantwell

SCHOOLS:

A Missouri school board may govern the appearance of students through specifically worded and narrowly drawn dress and appearance codes only if the district can factually justify such codes as being reasonably necessary to promote intelligent conduct and control of its schools and only if the district can factually justify such codes as being reasonably necessary to carry out the educational mission of the school district.

OPINION NO. 21

April 2, 1973

Honorable Hardin C. Cox  
Representative  
Seventy-eighth District  
300 Main Street  
Rock Port, Missouri 64882



Dear Representative Cox:

This official opinion is issued in response to your request for a ruling on whether a school board has the authority to prescribe dress and appearance codes for students.

Your request, prompted by inquiries that you have received from a student, a school superintendent, and a school board member in your district, does not contain any other facts. Although you have asked generally about dress and appearance codes, we will assume that the dress code about which you inquire contains regulations commonly found in such codes, e.g., hair length or style, length of skirts, whether or not pants may be worn by girls, etc.

Generally, each school board may make rules and regulations necessary for the government of a school district:

"The school board of each school district in the state may make all needful rules and regulations for the organization, grading and government in the school district. . . ." Section 171.011, RSMo 1969.

School board regulations governing the personal appearance of students attending the schools of the district have been the subject of two recent court decisions in Missouri. In Lawrence J. Kraus v. Board of Education of the City of Jennings, --- S.W.2d --- (Mo., March 12, 1973, No. 57597), the most recent of these decisions, the Missouri Supreme Court considered whether the trial court had properly considered itself bound by the decision in

Honorable Hardin C. Cox

Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971).<sup>1</sup> Relying on Bishop, the court below had ruled that the school board's rules and regulations dealing with hair length and style were unconstitutional and void. The Missouri Supreme Court reversed, stating:

" . . . It would serve no useful or proper purpose for us to comment on the holding in the Bishop case. It is enough to say: (1) that we do not agree with it; and (2) that we agree with the position, *supra*, taken by the Ninth Circuit in the King case. The judgment must be reversed and the cause remanded with directions to dissolve the permanent injunction.

"We would hope that the controversies have now subsided and that it will not be necessary for the Board to again institute the dress code. If it does, and its action is contested, the trial court will follow Missouri law to the effect that the limits of the Board's discretion, in so acting, 'should extend no further than may be found reasonably necessary to promote the intelligent conduct and control of the school \* \* \*.' Wright v. Board of Education, 295 Mo. 466, 246 S.W. 43, 47 (1922). Of course, if by then the United States Supreme Court has spoken directly to the question, the trial court will follow the 'supreme law of the land' as declared by the Court."

Therefore, based on the Kraus decision, we must conclude that hair regulations and presumably other kinds of appearance regulations are valid under Missouri law if the regulations are "reasonably necessary to promote intelligent conduct and control of the school. . . ."

However, a school district which attempts to enforce a dress code may still be sued in federal court based on an alleged violation of a student's federal constitutional right. Although the Missouri Supreme Court ruled in Kraus that Missouri courts are

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1. In Bishop, the United States Court of Appeals for the Eighth Circuit held that the particular hair regulation before it violated the plaintiff student's constitutional rights. The decision will be discussed at greater length later in this opinion.

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not bound by the Eighth Circuit Court of Appeals' interpretation of what the Federal Constitution requires with reference to hair regulations, the Bishop decision has not been overruled by the Eighth Circuit Court of Appeals or by the United States Supreme Court. Therefore, any case challenging the constitutionality of hair regulations, which would be filed in a federal district court in Missouri, would presumably be governed by Bishop rather than Kraus. In Bishop, the Court had before it the question of whether Stephen Bishop should be readmitted to the public schools of St. Charles, Missouri from which he had been suspended because his hair style violated the provisions of the school dress code. Plaintiffs contended that the dress code regulations concerning hair length and style for male students violated personal rights guaranteed by the United States Constitution.

The Court, in Bishop, pointed out that there are conflicting decisions on the constitutionality of dress code regulations among the various federal circuit courts and the federal district courts. The Court determined that "Stephen possessed a constitutionally protected right to govern his personal appearance while attending public school." Id. at 1075. The Court commented as follows in support of its conclusion concerning Stephen's constitutional right:

" . . . The common theme underlying decisions striking down hairstyle regulations is that the Constitution guarantees rights other than those specifically enumerated, and that the right to govern one's personal appearance is one of those guaranteed rights.

\* \* \*

"We believe that, among those rights retained by the people under our constitutional form of government, is the freedom to govern one's personal appearance. As a freedom which ranks high on the spectrum of our societal values, it commands the protection of the Fourteenth Amendment Due Process Clause. See Crews v. Cloncs, 432 F.2d 2169 (7th Cir. 1970); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970). The importance attached to such personal freedom has been long recognized. Writing in 1891, Justice Gray said:

"No right is held more sacred, or is more carefully guarded, by the common law, than the right of every

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individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said to be a right of complete immunity: to be *let* alone.' [Union Pacific Railway Company v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891)]" Id. at 1075.

Having determined that Stephen possessed a right to govern his personal appearance, the Court then pointed out that personal freedoms are not absolute and must yield when they intrude upon the freedoms of others:

"... Personal freedoms are not absolute; they must yield when they intrude upon the freedoms of others. Our task, therefore, is to weigh the competing interests asserted here. In doing so, we proceed from the premise that the school administration carries the burden of establishing the necessity of infringing upon Stephen's freedom in order to carry out the educational mission of the St. Charles High School. See Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970). Since our decision must turn on the regulations, we review the evidence adduced in their support." Id. at 1075-1076.

The Court then analyzes whether the district had established a factual necessity for its regulation of hair length and concluded that it had not. Id. at 1077. Therefore, the regulation was invalid and its terms unenforceable. Circuit Judge Lay, in a concurring opinion, concluded as follows:

"The question confronting us is whether there exists any real educational purpose or societal interest to be served in the discipline the school has adopted. After due consideration I fail to find any rational connection between the health, discipline or achievement of a particular child wearing a hair style which touches his ears or curls around his neck, and the child who does not. The gamut of rationalizations for justifying this restriction fails in light of reasoned analysis. . . ." Id. at 1078.

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Certain general conclusions can be drawn from Bishop and Kraus which can be applied to the question you ask. According to Bishop, no restriction on a student's constitutional right to govern his personal appearance while attending public school will be permitted unless the school administration can establish that the regulation is necessary in order to carry out the educational mission of the school. The school district must have factual support for its conclusion that such a restriction is necessary. Under Kraus, a Missouri board of education may, under its general rule-making power, promulgate appearance regulations which are reasonably necessary to promote intelligent conduct and control of the schools in the district. Assuming that the board of education of the school district can factually support its decision that specific, narrowly drawn appearance regulations are reasonably necessary to carry out the board's responsibility for governing its school district, the regulations would probably pass muster under both Bishop and Kraus.

#### CONCLUSION

Therefore, it is the opinion of this office that a Missouri school board may govern the appearance of students through specifically worded and narrowly drawn dress and appearance codes only if the district can factually justify such codes as being reasonably necessary to promote intelligent conduct and control of its schools and only if the district can factually justify such codes as being reasonably necessary to carry out the educational mission of the school district.

The foregoing opinion, which I hereby approve, was prepared by my Assistant D. Brook Bartlett.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large, stylized initial "J" and a long, sweeping underline.

John C. Danforth  
Attorney General



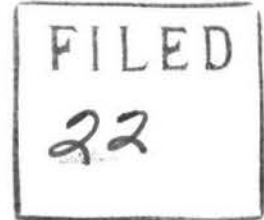
ELECTIONS:  
CONSTITUTIONAL LAW:

A law calling for an election on the question of whether or not to hold a constitutional convention may be enacted by initiative.

OPINION NO. 22

March 9, 1973

Honorable Harold Reisch  
Representative, District 110  
Room 203B, Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Reisch:

This is in response to your request for an opinion on the following question:

"Can the proposition of calling a constitutional convention be placed on an election ballot by the power of initiative?"

Article XII, Section 3(a) of the Missouri Constitution provides in part:

"At the general election on the first Tuesday following the first Monday in November 1962, and every twenty years thereafter, the secretary of state shall, and at any general or special election the general assembly by law may, submit to the electors of the state the question 'Shall there be a convention to revise and amend the constitution?' . . ."

Thus, it may be seen that the question of having a convention to revise and amend the Constitution is submitted to the electorate as a matter of course once every twenty years; and also that the question may be submitted to the electorate at a general or special election by "the general assembly by law."

Your question is whether or not the power of initiative may be utilized to submit the question of a constitutional convention to the electorate.

Article III, Section 49 of the Constitution provides:

"The people reserve power to propose and enact or reject laws and amendments to the constitution

Honorable Harold Reisch

by the initiative, independent of the general assembly, and also reserve power to approve or reject by referendum any act of the general assembly, except as hereinafter provided."

The limitations on the power of initiative are contained in Article III, Section 51. There it is provided that:

"The initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby, or for any other purpose prohibited by this constitution. . . ."

Nowhere does the Constitution specifically prohibit the submission of the question by initiative of whether or not a law is to be enacted requiring an election on the question of holding a constitutional convention. Examination reveals that the Constitutional Debates of the 1945 Constitutional Convention are silent on the question of whether the phrase "the general assembly by law" found in Article XII, Section 3(a), relating to a constitutional convention was intended to limit such a law to a law passed by the general assembly as opposed to a law enacted by initiative.

In the case of State ex rel. Lashly v. Becker, 235 S.W. 1017 (Mo. banc 1921), the court observed with respect to the constitutional amendment to the 1875 Constitution granting the people the power to initiate legislation:

"This amendment authorizes the people to initiate laws, yet no court would hold that they could initiate a valid law, if such law was opposed to any reservation of power, or restriction of legislative power, contained in the Constitution at the adoption of the amendment. See the Oregon cases *supra*, both of which were before we adopted our amendment. The framers of the amendment had no such intent, and their intent must clearly appear from the documents. If they initiated and voted a law lending the state's credit 'to any person, association or corporation,' we would have to hold such law void, as violative of section 45 of article 4. So throughout the restrictions upon legislative power or authority. The sole idea was to centralize legislative authority or power in a given and single forum, so that the referendum and initiative rights of the people would be preserved. They

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did not intend, nor do thoughtful people think, that they intended to utterly destroy the reservations and restrictions of the document that they were amending. As said, their purpose was to center all legislative power or authority (as we have defined it supra) in one single legislative forum, so that they could invoke either the referendum or the initiative. That forum they made the General Assembly. . . ."  
235 S.W. at 1021-1022

Article IV, Section 5 of the 1875 Constitution prohibiting the grant of public credit to private individuals, as well as the successor provision in the present Constitution, Article III, Section 39, begin respectively, "The general assembly shall have no power" and "The general assembly shall not." Neither provision expressly prohibits such laws by initiative. However, from the quoted language from the Lashly case above, it is apparent that the restriction in those provisions applies equally to the power of initiative as it does to the power of the general assembly.

Similarly, the Supreme Court in State ex rel. Gordon v. Becker, 49 S.W.2d 146 (Mo. banc 1932) indicated that the people had authority to enact legislative districts by initiative although the Constitution placed this duty in the general assembly.

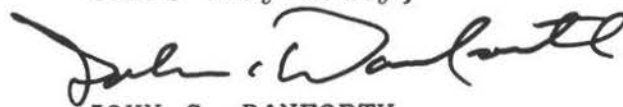
We believe those two cases taken together indicate that the people's power to enact legislation by initiative, except when restricted by the express provisions of Article III, Section 51, is as broad as the general assembly's power to enact laws. Therefore, we do not read the language in Article XII, Section 3(a) providing "the general assembly by law" as precluding such a law from being enacted by initiative.

#### CONCLUSION

We are of the opinion that a law calling for an election on the question of whether or not to hold a constitutional convention may be enacted by initiative.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Charles A. Blackmar.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

SCHOOLS:  
TEACHERS:  
PUBLIC SCHOOL RETIREMENT SYSTEM:

The board of education of a school district has authority under the provisions of subsection 1 of Section 168.106,

RSMo 1969 and Section 171.011, RSMo 1969, to adopt a regulation requiring a permanent teacher to retire at sixty-five years of age.

OPINION NO. 23

March 13, 1973

Honorable Mark A. Youngdahl  
State Representative, District 9  
Room 412 State Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Youngdahl:

This is to acknowledge receipt of your request for an official opinion of this office which reads as follows:

"V.A.M.S. §169.060(1) provides as follows:

'A member who is 70 years of age or more one year after the date the retirement system becomes operative shall be retired as of that date and shall be entitled to benefits, as provided in §§169.010 to 169.130, on the basis of his creditable service. Thereafter, a member shall be retired automatically on the first day of July next following the school year in which he reaches the age of 70 years, and shall thereupon be entitled to benefits, as provided in §§169.010 to 169.130, on the basis of his creditable service, if his creditable service is 5 years or more.'

"The question which is being presented for an official opinion is as follows: (a) May the School District of St. Joseph, Missouri, an urban school district, provide under the rules and regulations of the Board of Education that a teacher must mandatorily retire at the age of 65 years in light of the above statute?"

Honorable Mark A. Youngdahl

You further indicate as follows:

"Through the years, the Board of Education of the School District of St. Joseph, Missouri, an urban school district, has formulated rules and regulations which are binding upon the teachers of said district and which are made a part of the contract between the teacher and the School District of St. Joseph, Missouri. The Board of Education of the School District of St. Joseph, Missouri, is desiring to formulate a rule and regulation making retirement of teachers mandatory upon reaching the age of 65 years. The question has arisen as to whether or not V.A.M.S. §169.060 impliedly gives a teacher a right to teach until reaching the age of 70 years before facing mandatory retirement, assuming said teacher meets all other qualifications as called for by the statutes. In other words does V.A.M.S. §169.060 give a teacher a qualified right to teach until he reaches the age of 70, which right cannot be changed by mere rule and regulation by the Board of Education."

In rendering this opinion, the assumption is made that you are referring to a permanent teacher as that term is defined in subsection 4 of Section 164.104, RSMo 1969, of the Teacher Tenure Act. In addition, the assumption is made that the St. Joseph School District is a school district included within the provisions of Section 169.020, RSMo 1969, relating to the Public School Retirement System of Missouri.

Generally, the Public School Retirement System of Missouri is provided for by Sections 169.010 through 169.130, RSMo 1969. In this regard Section 169.050, RSMo 1969, provides in part as follows:

"... all employees as herein defined of districts included in the retirement system thereby created shall be members of the system by virtue of their employment."  
(Emphasis ours)

"Employee" is defined by subsection 5 of Section 169.010, RSMo 1969, as synonymous with the term "teacher". Therefore, teachers are members of the retirement system as a result of their employment. Subsection 1 of Section 169.060 provides for



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compulsory retirement of a member as of July 1 next following the attainment of age seventy.

With respect to the authority of school districts to make rules and regulations, Section 171.011, RSMo 1969, provides as follows:

"The school board of each school district in the state may make all needful rules and regulations for the organization, grading and government in the school district. The rules shall take effect when a copy of the rules, duly signed by order of the board, is deposited with the district clerk. The district clerk shall transmit forthwith a copy of the rules to the teachers employed in the schools. The rules may be amended or repealed in like manner."

Generally the power of a board of education of a school district to make rules and regulations is subject to the limitation that no such rule or regulation may conflict with or contravene any statute or constitution, and that a board may not restrict or diminish or enlarge its own powers or jurisdiction. 78 C.J.S. Schools and School Districts, Section 121, page 908. It was also pointed out in Magenheim v. Board of Education of the School District of Riverview Gardens, 347 S.W.2d 409 (St.L.Ct.App. 1961), that the legislature has delegated to school boards the power to exercise their judgment and discretion in matters affecting school management, including the employment of teachers, and a court will not interfere unless the board exercises such power in an unreasonable, arbitrary, capricious or unlawful manner.

In connection with the above, Section 168.106, RSMo 1969, of the Teacher Tenure Act, provides in part as follows:

"The contract between a school district and a permanent teacher shall be known as an indefinite contract and shall continue in effect for an indefinite period, subject only to:

(1) Compulsory or optional retirement when the teacher reaches the age of retirement provided by law, or regulation established by the local board of education;"  
(Emphasis ours)

Thus, under the above statute, a permanent teacher's contract continues indefinitely except for certain exceptions, one of which

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being compulsory or optional retirement provided by law, or regulation established by the local board of education. Therefore, it is our view that under the provisions of subsection 1 of Section 168.106 and Section 171.011, a board of education of a school district would have authority to adopt a regulation requiring a permanent teacher to retire at sixty-five years of age.

CONCLUSION

It is the opinion of this office that the board of education of a school district has authority under the provisions of subsection 1 of Section 168.106, RSMo 1969 and Section 171.011, RSMo 1969, to adopt a regulation requiring a permanent teacher to retire at sixty-five years of age.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Danforth" written in a more compact, cursive style.

JOHN C. DANFORTH  
Attorney General



CONSTITUTIONAL LAW:  
MOTOR VEHICLES:  
DRIVER'S LICENSE:

The issuance of a motor vehicle operator's license may not be refused to a person solely on the ground that he refuses to submit to a photograph, when that refusal is based solely upon religious beliefs.

OPINION NO. 25

January 4, 1973

Honorable Morris G. Westfall  
Representative - 140th District  
Highway 32  
Halfway, Missouri 65663



Dear Representative Westfall:

This opinion is in response to your request for an official opinion of the Attorney General upon the following question:

"May the Department of Revenue refuse to issue a motor vehicle operator's license to a person whose religious beliefs preclude his submission to the taking of a photograph of the licensee as required by Sec. 302.181, RSMo, but who otherwise satisfies all requirements for the issuance or renewal of a motor vehicle operator's license."

Section 302.181, RSMo 1969, as amended, Laws, 1971, page     , House Bill No. 365, Section 1, which became effective July 1, 1972, provides, in part, as follows:

"1. The chauffeur's license and motor vehicle operator's license issued under the provisions of this chapter shall be in such form as the director shall prescribe but the license shall be a card made of plastic or other comparable material. All licenses shall bear the licensee's social security or tax identifying number, if the licensee has one,

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and if not, then a number assigned to the licensee by the director, the expiration date of the license, the name, date of birth, residence address, and a brief description and colored photograph of the licensee, and either a facsimile of the signature of the licensee or a space upon which the licensee shall write his usual signature with pen and ink immediately upon receipt of the license. No license shall be valid until it has been so signed by the licensee. . . .

"2. All film involved in the production of photographs for chauffeur's license and motor vehicle operator's license shall become the property of the department of revenue.

\* \* \*

"4. The department of revenue may issue a temporary license without the photograph to out-of-state applicants, members of the armed forces, and in those situations where for any other reason the department finds it necessary; provided, however, where such temporary license is issued it shall be valid only until the applicant shall have had time to appear and have his picture taken and a license with his photograph issued." (Emphasis added).

You state that your request for the opinion is made so as to determine whether the state may constitutionally require all applicants for a license to submit to a photograph and, if the state may so constitutionally require their submission, that you would then anticipate introducing legislation at the Seventy-Seventh General Assembly, State of Missouri, to provide certain specific exemptions. In your request, you stated the facts in the following manner:

"Pursuant to Section 302.181, to obtain a motor vehicle operator's license, all licensees are required to have their photograph taken. A settlement of Amish Menno-

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nites in the Polk and Dallas County areas believe that it is contrary to God's will for them to have their picture taken. They base their belief on the following scripture:

"Thou shalt not make unto thee any graven image or any likeness of anything that is in heaven above or that is in the earth beneath or that is in the water under the earth. Exodus 20:4

"Thus, unless some exception is made on religious grounds, it will not be possible for this group to legally operate their automobiles."

In answering your inquiry, we have been guided principally by two opinions of the Supreme Court of United States. The first, Sherbert v. Verner, 374 U.S. 398, 10 L.Ed.2d 965, 83 S.Ct. 1790 (1963), held that a Seventh-Day Adventist who was discharged by her employer for refusal to work on Saturday, which was the Sabbath Day of her faith, and was subsequently refused unemployment compensation by the state employment security commission because of her refusal to work on Saturdays, constituted an impermissible restriction upon the free exercise of her religion. The second case, Wisconsin v. Yoder, 406 U.S. 205, 32 L.Ed.2d 15, 92 S.Ct. 1526 (1972), reversed the conviction of members of the Old Order Amish Religion and the Conservative Amish Mennonite Church, for violation of Wisconsin's compulsory school attendance law which required a child's school attendance until age sixteen. The defendants had declined to send their children to public or private school after completion of the eighth grade. The Supreme Court held that the application of the compulsory school attendance law violated their rights under the free exercise clause of the First Amendment, and that the state's interest in universal education was not sufficient to override the protections afforded to the defendants under the free exercise clause of the First Amendment.

The first inquiry is whether the religious belief or practice here asserted is sufficient to qualify as a religious belief or practice entitled to constitutional protection. Certain principles have been articulated by which such a determination should be made:

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"We come then to the quality of the claims of the respondents concerning the alleged encroachment of Wisconsin's compulsory school attendance statute on their rights and the rights of their children to the free exercise of the religious beliefs they and their forebears have adhered to for almost three centuries. In evaluating those claims we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claim would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clause." Wisconsin v. Yoder, 32 L.Ed.2d 15, 25.

For the purpose of this opinion, we assume that the religious belief here asserted is sufficient to qualify as a religious belief or practice entitled to constitutional protection.

Here, the state regulation is clearly within its power to promote the health, safety and general welfare, however, even so, there are areas of conduct which are within the protection

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of the First Amendment to the Constitution of the United States of America.

"Wisconsin concedes that under the Religion Clauses religious beliefs are absolutely free from the State's control, but it argues that 'actions,' even though religiously grounded, are outside the protection of the First Amendment. But our decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. See, e.g., *Gillette v United States*, 401 US 437, 28 L Ed 2d 168, 91 S Ct 828 (1971); *Braunfeld v Brown*, 366 US 599, 6 L Ed 2d 563, 81 S Ct 1144 (1961); *Prince v Massachusetts*, 321 US 158, 88 L Ed 645, 64 S Ct 438 (1944); *Reynolds v United States*, 98 US 145, 25 L Ed 244 (1878). But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability. E.g., *Sherbert v Verner*, 374 US 398, 10 L Ed 2d 965, 83 S Ct 1790 (1963); *Murdock v Pennsylvania*, 319 US 105, 87 L Ed 1292, 63 S Ct 870, 146 ALR 81 (1943); *Cantwell v Connecticut*, 310 US 296, 303-304, 84 L Ed 1213, 1217, 1218, 60 S Ct 900, 128 ALR 1352 (1940). This case, therefore, does not become easier because respondents were convicted for their 'actions' in refusing to send their children to the public high school; in this context belief and action cannot be neatly confined in logic-tight compartments. Cf. *Lemon v Kurtzman*, 403 US 602, 612, 29 L Ed 2d 745, 755, 91 S Ct 2105 (1971)." Wisconsin v. Yoder, 32 L.Ed.2d 15, 27-28.

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The statutory requirement, while neutral on its face, may still be violative of First Amendment freedoms.

"Nor can this case be disposed of on the grounds that Wisconsin's requirement for school attendance to age 16 applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. *Sherbert v. Verner*; cf. *Walz v. Tax Comm.*, 397 US 664, 25 L Ed 2d 697, 90 S Ct 1409 (1970). The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise. . . ."  
Wisconsin v. Yoder, 32 L.Ed.2d 15, 28.

Thus, for the requirement to stand, "it must appear, either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." Wisconsin v. Yoder, 32 L.Ed.2d 15, 24.

Does the state requirement of submission to a photograph in order to obtain a motor vehicle operator's license impose a burden upon the free exercise of religious belief under these facts? Application of principles by which such a determination should be made as set forth in Sherbert v. Verner, supra, compel the conclusion that such requirement does impose such a burden. As stated by Mr. Justice Brennan.

"We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does.



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In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For '[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.' Braunfeld v Brown, supra (366 US at 607). Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forgo that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." Sherbert v. Verner, 10 L.Ed.2d 970-971.

It is clear that a motor vehicle operator's license, its issuance and retention, involves sufficiently important interest of the licensees, that such issuance or suspension, must satisfy relevant constitutional limitations. Bell v. Burson, 402 U.S. 535, 29 L.Ed.2d 90, 91 S.Ct. 1586 (1971). It is unimportant whether the license is considered to be a "right," "entitlement," or "privilege." Sherbert v. Verner, supra; Bell v. Burson, supra.

We conclude, as did the Supreme Court of the United States that:

"The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such, Cantwell v Connecticut, 310 US 296, 303, 84 L ed



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1213, 1217, 60 S Ct 900 128 ALR 1352. Government may neither compel affirmation of a repugnant belief, *Torcaso v Watkins*, 367 US 488, 6 L ed 2d 982, 81 S Ct 1680; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler v. Rhode Island*, 345 US 67, 97 L ed 829, 73 S Ct 526; . . . On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.' *Braunfeld v. Brown*, 366 US 599, 603, 6 L ed 2d 563, 566, 81 S Ct 1144. The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order. See, e.g., *Reynolds v. United States*, 98 US 145, 25 L ed 244; *Jacobson v. Massachusetts*, 197 US 11, 49 L ed 643, 25 S Ct 358; *Prince v Massachusetts*, 321 US 158, 88 L ed 645, 64 S Ct 438; *Cleveland v United States*, 329 US 14, 91 L ed 12, 67 S Ct 13." *Sherbert v. Verner*, 374 U.S. 398, 402-403, 10 L.Ed.2d 965, 969-970, 83 S.Ct. 1790 (1963).

The religious conduct here asserted on religious principles does not pose a substantial threat to public safety, peace or order.

The second inquiry is whether an incidental burden on the free exercise of religion may be justified by compelling state interest in the regulation of a subject within the state's constitutional power to regulate. The test to be applied has been stated in the following manner:

" . . . It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation,' . . ." *Sherbert v. Verner*, 374 U.S. 398, 406.

Honorable Morris G. Westfall

Clearly, such requirement, i.e., submission to a photograph relates not at all to a person's qualification or responsibility as a holder of a motor vehicle operator's license. We think it is abundantly clear that prior decisions of the Supreme Court of the United States would find that the state interest here involved was insufficient to support the burden imposed upon the free exercise of religion. Sherbert v. Verner, supra; State of Wisconsin v. Yoder, 406 U.S. 205, 32 L.Ed.2d 15, 92 S.Ct. 1526 (1972).

#### CONCLUSION

Therefore, for the foregoing reasons, we conclude that the issuance of a motor vehicle operator's license may not be refused to a person solely on the ground that he refuses to submit to a photograph, when that refusal is based solely upon religious beliefs.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Gene E. Voigts.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

CIRCUIT CLERK:

FEES:

COSTS:

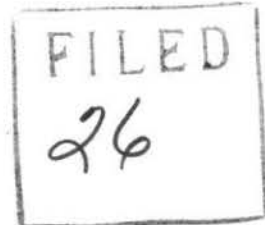
If a rule of the circuit court requires a deposit to secure a fee of the circuit clerk in civil cases specified in Section 483.540 (H.C.S.

S.B. No. 496, 76th General Assembly, Second Regular Session) and the charge has accrued, fifty percent of the clerk's fee must be paid to the director of revenue each month and fifty percent to the county. If a rule of the court does not expressly allocate the deposit, the distribution of the clerk's fees is to be made after the liability for costs has been established and the costs collected in whole or in part. If, when liability has been established, accrued costs cannot be collected in full, charges not having any statutory priority or not allocated under court rule should be prorated.

OPINION NO. 26

January 24, 1973

Honorable Thomas I. Osborne  
Prosecuting Attorney  
Audrain County  
Mexico, Missouri 65265



Dear Mr. Osborne:

This opinion is in response to your request in which you ask whether the fifty percent of the fees of the circuit court clerk in civil cases which are required to be paid to the director of revenue under the provisions of new Section 483.541 (H.C.S.S.B. No. 496, 76th General Assembly, Second Regular Session) are to be taken from the cost deposit before the cause is tried or at the termination of the case when the liability for costs is determined.

Section 483.541, provides:

"1. It shall be the duty of the clerk of all circuit courts and courts of common pleas of this state with the approval of the judge of the court to charge, on behalf of the state, fifty percent of every fee that accrues in his office by reason of sections 483.530 and 483.540, and to receive the same, and at the end of each month pay over to the director of revenue all such money collected by him as such fees, taking two receipts therefor, one of which he shall immediately file with

the state treasurer, and shall at the end of each month make out an itemized and accurate list verified by affidavit of all fees collected by him, giving the name of the person or persons paying the same, and turn over the report to the director of revenue.

"2. On or before the thirty-first day of January of each year the circuit clerk shall file a verified report with the county treasurer or treasurer of the city of St. Louis, as the case may be, and with the director of revenue, showing all fees due and unpaid in his office in cases where the liability thereof has finally been established during the preceding year, showing the name of the person or persons owing same, and stating that he has been unable, after the exercise of diligence, to collect the same. The prosecuting attorney of the county or of the city of St. Louis shall collect such unpaid fees and shall deposit them with the circuit clerk, who will receipt him therefor, and the clerk shall forward the funds to the proper authority as is provided by law.

"3. All circuit court fees received by the director of revenue shall be deposited by him with the state treasurer in the 'Court Judicial Fund' which is hereby created; provided, that the treasurer shall deposit all moneys in excess of two hundred fifty thousand dollars in general revenue. The money in the court judicial fund shall be used for no other purpose than for the payment of salaries of the supreme court, districts of the court of appeals, and circuit judges and commissioners; provided, however, that such salaries shall be paid from the general revenue fund of the state whenever the balance in the court judicial fund or the appropriation from such fund is insufficient to pay the salaries."

The fees to which you refer are those under Section 483.540, which was enacted concurrently with the above section and which provides:

"1. The clerks of the circuit courts and of the courts of common pleas, shall charge and

Honorable Thomas I. Osborne

collect in all civil proceedings the following fees to aid in defraying the expenses of judicial administration:

Each civil case instituted in that court. . . . .	\$25.00
Each additional summons issued for additional defendants. . . . .	1.00
Each alias summons issued. . . . .	1.00
Each pluralis summons issued . . . .	1.00
Each third party defendant issued. .	1.00
Each appeal from municipal courts. .	20.00
Each appeal from magistrate courts .	20.00"

We also understand that some circuit courts acting in contemplation of the increased fees under Section 483.540 have raised the amount required for filing fees to secure adequate security for the payment of the increased fees and that such cost deposits vary considerably.

We find no express statutory authority for the deposit of a fixed amount of costs by general rule of court on the court's initiative. Costs in civil cases are usually secured in the manner and under the provisions of Chapter 514, RSMo and Supreme Court Rules 77.01, et seq., which contain no such express authorization for the circuit courts to provide for such fixed deposits by rule. We know of no express Supreme Court Rule fixing such cost deposits or authorizing the lower courts to fix such cost deposits under Section 4 of Article V respecting the courts supervisory jurisdiction over inferior courts. We presume however, without passing on the question of the circuit court's authority to make such rules that the circuit courts believe their authority is based on the provisions of Supreme Court Rule 50.01 which provides:

"Courts of Appeals and trial courts may make rules governing the administration of judicial business if the rules are not contrary to the rules of the Supreme Court, to the Constitution or to statutory law in force."

We have not been advised as to whether or not the circuit court rules with respect to such deposits require that the deposit be allocated for a particular purpose or purposes. It is common knowledge that certain statutes, for example Sections 514.440, RSMo et seq., authorize the judges of the circuit courts, by rule of court, to require a deposit for law library fees and it follows that such deposits must be collected and handled in accordance with the particular provisions involved.



Honorable Thomas I. Osborne

Section 483.541, of course, literally applies only to Sections 483.530 (clerks' criminal costs, not applicable to this question) and 483.540 (clerks' civil costs, as quoted above). Clearly there are other costs involved in civil litigation which are not within such sections and not subject to the provisions of Section 483.541, such as court reporters' fees, sheriffs' fees, witnesses and jury fees and the like.

We previously held in our Opinion No. 420, dated November 24, 1971 to Paden, copy enclosed, that the clerk of the circuit court has authority to pay the costs of such an action out of a deposit made by the plaintiff even though the costs were taxed against the defendant and recognized that such deposits were simply security for costs incurred and that the plaintiff in such a case must look to defendant against whom costs were taxed for recovery. Thus this office, and in our view the courts, have looked on such deposits as security.

It is our view that if the rule of the circuit court requires a deposit to secure a fee specified in Section 483.540, such as the twenty-five dollar fee for each case instituted or any of the enumerated fees or charges, the court by its rule has expressly allocated such funds deposited to the particular charge or charges required to be made by the clerk and payment must be made at the end of each month to the director of revenue as provided in Section 483.541 after the service has been rendered or the charge accrued. If the rule does not expressly allocate the funds required to be deposited to any particular charge or charges required to be made by the clerk under Section 483.540, it is our view that the distribution is to be made by the clerk as provided in Section 483.541 at the conclusion of the case when the liability for costs has been finally established and the fees which are earned and accrued have been collected in whole or in part.

Finally, the next logical question is whether the clerk should prorate the deposit and the amount collected according to allowable costs when the liability for costs has been established and the total amount of the costs exceeds the cost deposit and the amount collected. We believe that this question is answered by our Opinion No. 82, dated May 22, 1939 to Short, which we quote in part as follows:

"In your next question you ask whether a clerk when he cannot collect the full amount of costs should pro rate the amount he does have on hand with all of the parties entitled to fees. It is our opinion that the clerk should pro rate such funds among all parties entitled to fees, including yourself, the sheriff, witnesses and jurors. There is no

Honorable Thomas I. Osborne

statute in this state which gives any of these persons a prior claim to any of the deposits on hand or amounts collected for the payment of costs. None of the appellate courts, as far as we have been able to determine have ever passed on this question, but since the law does not give any prior claim to any of such parties, it is only equitable and fair that the same should be pro rated."

It remains our view that such costs, with the exception of cost deposits expressly allocated by court rule, should be prorated if necessary in the absence of any statute establishing priorities. Obviously if costs are prorated, the director of revenue and the county are each entitled to fifty percent of the prorated costs coming under Section 483.540.

#### CONCLUSION

It is the opinion of this office with respect to court costs that:

If a rule of the circuit court requires a deposit to secure a fee of the circuit clerk in civil cases specified in Section 483.540 (H.C.S.S.B. No. 496, 76th General Assembly, Second Regular Session) and the charge has accrued, fifty percent of the clerk's fee must be paid to the director of revenue each month and fifty percent to the county. If a rule of the court does not expressly allocate the deposit, the distribution of the clerk's fees is to be made after the liability for costs has been established and the costs collected in whole or in part.

If, when liability has been established, accrued costs cannot be collected in full, charges not having any statutory priority or not allocated under court rule should be prorated.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN C. DANFORTH  
Attorney General

Enclosure: Op. Ltr. No. 420  
11/24/71, Paden



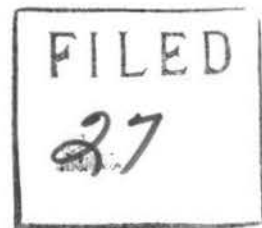
SCHOOLS:  
TUITION:  
JUVENILES:  
BOARD OF TRAINING SCHOOLS:

A child under the custody of the State Board of Training Schools who has been placed in his own home, a relative's home, a foster home or a group home is entitled to attend the public school district in which such home is located without payment of tuition.

OPINION NO. 27

March 9, 1973

Mr. Frederick O. McDaniel  
Acting Director  
Missouri State Board of  
Training Schools  
Post Office Box 447  
Jefferson City, Missouri 65101



Dear Mr. McDaniel:

This is in response to your opinion request wherein you ask the following questions:

"The Missouri State Board of Training Schools is inquiring as to the propriety of the claim for tuition under the following circumstances.

- a) A child is institutionalized and thereafter released on community placement to his parents or family. He attends public school while on community placement and makes satisfactory adjustment and is discharged, can a proper claim for tuition be made for the time the youth attends public school prior to his discharge from supervision?
- b) A child is institutionalized but is returned on community placement to a relative in a community different from his original home and attends public school and is ultimately discharged from supervision of the Board of Training Schools, can the school district make a proper claim for tuition for the time the youth attends public school prior to the time he is discharged from supervision?

Mr. Frederick O. McDaniel

c) A child is institutionalized and given community placement in a foster home, he then attends public school and is ultimately discharged, can the school district make a proper claim for tuition for the time the youth attends school prior to the time of his discharge from supervision?

d) A child is institutionalized and is ultimately given community placement in a Group Home and attends public school and at some point is discharged from supervision, can the school district make a proper claim for tuition for the time the youth attends the public school prior to the time he is discharged from supervision?

e) A child is not institutionalized but is immediately placed on community placement with a relative in a community other than that from which he came and is supervised by the Placement Division in that community. He attends public school and is ultimately discharged from supervision. Can a school district make a proper claim for tuition for the period of time that the child attends school prior to the time he is discharged?

f) A child is not institutionalized but is released on community placement to a foster home where he attends public school and is ultimately discharged. Can the school district make a proper claim for tuition during the time the child attends public school prior to his discharge from supervision?

g) A child is not institutionalized but is released on community placement to a Group Home, he attends public school and is ultimately discharged, can the school district make a proper claim for tuition for the time that the child attends school from the Group Home prior to his discharge from supervision?

h) In the event a school district can make a proper claim for tuition in any of the above styled incidents is it the obligation of the Board of Training Schools to pay the tuition required or is the tuition to be paid by the home school district of the child or from some other source and if so what is the source?"

Mr. Frederick O. McDaniel

By way of further explanation you also state:

"A Group Home is staffed and managed by the State Board of Training Schools. The Group Home shall have an appointed administrative head. This individual is a professional caseworker. The remainder of the staff includes two full time house parents, one part time houseparent, and one full time cook. There are no education services provided as a part of the Group Home Program. The unit shall provide dormitory and food services and staff supervision shall be on a 24 hour basis. A primary consideration in the foster home or group home program is the development of community resources in dealing with the rehabilitative process of the child. In view of the fact that the purpose of these programs is to keep the child in touch with the community and teach him how to operate positively within the community it is necessary for him to attend local institutions. This would include the public school system.

"Classification to the foster home or group home program shall be accomplished by the Board of Training School's Central Office after careful consideration of the social data and upon recommendation of the reception and orientation staff at the Training School. Children who have a mild history of delinquency will be candidates for such programs."

It is also our understanding that the group homes of which you speak are or will number approximately ten throughout the state, each housing approximately eight juveniles and that such homes are not directly connected with the major institutions of the Board of Training Schools, although they are, as you have indicated, operated by the Board using appropriations made for such purposes.

The questions you present must be considered in light of the general state policy toward free public education as set forth in the Constitution of Missouri, Article IX, Section 1(a), which provides as follows:

"A general diffusion of knowledge and intelligence being essential to the preservation of

Mr. Frederick O. McDaniel

the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law. . . ." (emphasis added)

The Springfield Court of Appeals in State ex rel. Halbert v. Clymer, 147 S.W. 1119, 1120 (Spr.Ct.App. 1912) recognizing this policy as defined by the above-quoted constitutional provision stated:

"The policy of this state is to educate and to furnish free of charge good schools for all children of school age, and even to compel the attendance of children thereto. . . . It is therefore the duty of the courts to liberally construe our statutes relating to schools, and in such a manner as to open, and not to close, the doors of the schools against the children of the state. . . ."

Section 219.020, RSMo, provides:

"There is hereby created and established a 'State Board of Training Schools' which shall have charge and control of all training schools and industrial homes for boys and girls of this state, specifically: The Training School for Boys at Boonville; The Training School for Girls; together with all branches and divisions thereof; and over all institutions for correctional training of juveniles which may hereafter be created in this state, which schools are hereby classified as educational institutions and recognized to have as their purpose the special correctional training, the education and the moral rehabilitation and guidance of juvenile offenders which any court of proper jurisdiction may assign to such institutions. The board shall provide for the reception, classification, care, activities, correction, education and rehabilitation of all juveniles committed by law to its charge or to any institution under its control."

Section 219.130, RSMo, provides:

Mr. Frederick O. McDaniel

"It shall be the duty of the board and the director of training schools, and of all the officers and employed personnel under their direction, to establish such courses of academic, vocational and other training and guidance as shall be best suited to accomplish the purpose of correcting previous deficiencies in the proper training of each child committed to their charge, and of pointing such child toward future law-abiding citizenship. It shall be the duty of the board and the director to request the assistance of the state department of education, or any branch or division thereof, and to utilize such assistance in establishing and maintaining special training programs for the mentally retarded; for manual, industrial and vocational schooling; and for all other educational activities which the board may deem necessary."

It is our view that the legislature in enacting the above sections intended to require the State Board of Training Schools to provide education to children confined in the training schools and that the above sections do not authorize the expenditure of appropriations to the training schools for the purpose of providing education in the public schools of this state in the situations you present.

Clearly, students are entitled to attend public schools in the district of their residence without payment of tuition. Barnard School District v. Matherly, 84 Mo.App. 140 (K.C.Ct.App. 1900). And, subsection 2 of Section 167.151, RSMo, provides:

"Orphan children, children with only one parent living, and children whose parents do not contribute to their support--if the children are between the ages of six and twenty years and are unable to pay tuition--may attend the schools of any district in the state in which they have a permanent or temporary home without paying a tuition fee."

In passing on the provisions of the above section in determining whether students qualify for a tuition free education, the courts have recognized a distinction between domicile and residence. State ex rel. Halbert v. Clymer, *supra*; Binde v. Klinger, 30 Mo.App. 285 (St.L.Ct.App. 1888). Under these authorities and under such circumstances, even though a child's domicile remains with his parents, his residency for school purposes is where he actually resides with some exceptions not relevant here.



Mr. Frederick O. McDaniel

The children placed with a relative, in a foster home or in a group home come within the purview of subsection 2 of Section 167.151 because the parents of such children do not contribute to their support and they are children within the purview of subsection 2 of Section 167.151. As a consequence, such children are entitled to attend the school in the district where the home in which they are placed is located regardless of their legal domicile.

The conclusion we reach is applicable to each of the questions presented. That is, whether or not a juvenile is technically under the custody of the State Board of Training Schools if the Board has released him to his parents or relatives, or places him in a foster home, or gives him community placement in a group home, the child is entitled to a free public education. In our view, the question of the control of the Board over the child does not affect the child's right to an education under such circumstances. If the child is placed with his family, unquestionably he is a resident of the school district where his family resides. If the child is placed in a home in a school district other than his domicile and comes within the purview of subsection 2 of Section 167.151, he is entitled to attend the schools of any district in the state in which he has even only a temporary home.

Insofar as concerns the question of whether or not such a child comes within subsection 2 of Section 167.151, the reference in that subsection to "children whose parents do not contribute to their support" means, in our view, literally what it says. The phrase does not bring into question the parents ability to support the child but only the fact of whether or not the child is supported by his parents. As we indicated, it is our view that these juveniles, under the liberal Clymer holding, would be considered as not supported by their parents.

#### CONCLUSION

It is the opinion of this office that a child under the custody of the State Board of Training Schools who has been placed in his own home, a relative's home, a foster home or a group home is entitled to attend the public school district in which such home is located without payment of tuition.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

March 13, 1973

OPINION LETTER NO. 28

Mr. Joseph Jaeger, Jr.  
Director of Parks  
State Park Board  
Post Office Box 176  
Jefferson City, Missouri 65101

Dear Mr. Jaeger:

You have requested my legal opinion on the following questions:

"Under Article III, Section 38A of the Missouri Constitution is the Missouri State Park Board required to exact a charge from a private corporation taking sight seeing tours across portions of public land under the control of the State Park Board?

"Assuming the Park Board must exact such a charge, does the activity of the private corporation constitute the construction, establishment, or operation of public services, privileges, conveniences, or facilities on land under the control of the State Park Board within the meaning of Section 253.080?"

We are advised that Ozark Scenic Tours, Inc. has received a Certificate of Convenience and Necessity from the Missouri Public Service Commission to operate as a passenger carrying motor carrier, using amphibious vehicles only, transporting sight-seeing parties on scheduled regular route tours originating and terminating in Branson, Missouri. The route approved by the Public Service Commission includes use of designated state highways, Table Rock Lake, and egress from the lake at the State Park Launching Ramp south of Table Rock Dam. The concrete boat ramp at Table Rock State Park



Mr. Joseph Jaeger, Jr.

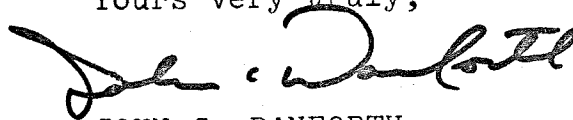
is located approximately 1,000 feet south of State Highway 165, with which it is connected by a park road. The Park Board does not charge the general public for the use of the ramp and the road. It is the use of this ramp and park road by Ozark Scenic Tours, Inc. as a route connection to the state highway that gives rise to your questions.

Section 253.080(1), RSMo, provides in part:

"The park board may construct, establish and operate suitable public services, privileges, conveniences and facilities on any land, site or object under its jurisdiction and control, and may charge and collect reasonable fees for the use of the same. . . ."

This statute would not in our opinion authorize the State Park Board to impose a fee solely upon Ozark Scenic Tours, Inc. for the corporation's use of the ramp and road at Table Rock State Park in connection with their amphibious sight-seeing tours. We believe that this statutory provision refers to something other than the construction of public roads and facilities that are open without charge to all citizens who wish to use them. It seems to us that the building of a road or facility which is open to the public generally without charge would also be required to be available to a scenic tour corporation without charge. It is our view that the provisions of Section 253.080(1) are applicable to facilities for which there is ordinarily a charge such as cabins, food, swimming, and other facilities for which a charge is made whether it be for corporate use or for use by private individuals.

Yours very truly,

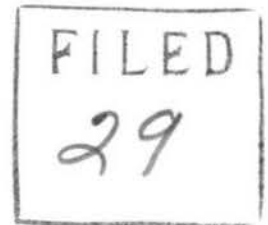


JOHN C. DANFORTH  
Attorney General

April 9, 1973

OPINION LETTER NO. 29  
Answer by letter-Nowotny

Mr. Robert Neuenschwander  
Director, Missouri Land  
Reclamation Commission  
Room B-36, Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Neuenschwander:

This is in reply to your request for an official opinion of this office asking five questions relating to the Land Reclamation Act found in Sections 444.760 through 444.786, RSMo Supp. 1971, concerning permits, acreage fees and bonds.

The policy of the law is declared in Section 444.762, reading in part as follows:

"It is hereby declared to be the policy of this state to provide, after surface mining operations are completed, for the reclamation and conservation of land subjected to surface disturbance by surface mining . . ."

Thus, the purpose of the law is to reclaim land where the surface has been disturbed as a result of surface mining.

"Surface mining" is defined as:

". . . the mining of clay, limestone, sand and gravel by removing the overburden lying above natural deposits thereof, and mining directly from the natural deposits thereby exposed, and shall include mining of exposed natural deposits of such minerals over which no overburden lies." Section 444.765(11)

Mr. Robert Neuenschwander

Section 444.770 requires a permit before engaging in surface mining, reading in part as follows:

"1. It shall be unlawful beginning January 1, 1972, for any operator to engage in surface mining without first obtaining from the commission a permit to do so, in such form as is hereinafter provided.

"2. Sections 444.760 to 444.786 shall apply only to those surface mining and pit areas which are opened on or after January 1, 1972, or to the extended portion of pits extended after that date."

"Pit" is defined as:

". . . the place where clay, limestone, sand and gravel are being or have been mined by surface mining;" Section 444.765(8)

"Affected land," which term is used in Section 444.772 providing for the permit application, is defined as follows:

". . . the pit area or area from which overburden shall have been removed, or upon which overburden has been deposited after September 28, 1971;" Section 444.765(1)

"Overburden" is defined as:

". . . all of the earth and other materials which lie above natural deposits of clay, limestone, sand and gravel; and also means such earth and other materials disturbed from their natural state in the process of surface mining;" Section 444.765(6)

I

Your first question reads:

"1. Under HB 519, if overburden is removed but the actual removal of clay or limestone is done several years or more after the removal of the overburden, when is it necessary to obtain a permit, pay acreage fees and file a bond?"

Mr. Robert Neuenschwander

We assume for purposes of this question that all activity occurred after January 1, 1972, and that the removal of overburden is for the purpose of mining clay or limestone.

The answer depends on the purpose for which the overburden was removed or disturbed. If a person removed what would be considered overburden for the purpose of then removing natural deposits of clay, limestone, sand or gravel, that person must obtain a permit before the removal of the overburden, for such person would be engaged in surface mining, even if the actual removal of the sought-after materials did not occur for several years after the operation began.

## II

Your second and third questions read:

"2. Under HB 519, if overburden is removed prior to January 1, 1972 but the actual removal of clay or limestone is done after January 1, 1972 is a permit, acreage fee and bond required?

"3. Under HB 519 if overburden and removal of clay or limestone is done prior to January 1, 1972 and after January 1, 1972 the only activity is further vertical extension of the pit downward, by removal of clay or limestone, is a permit, acreage fee and bond required?"

Under subsection 1 of Section 444.770 a person must obtain a permit to engage in surface mining after January 1, 1972. Surface mining means the mining (or taking) of materials by removing the overburden lying above such materials and then taking the materials out, or if there is no overburden over the materials, the direct removal of such materials. Section 444.765(11).

Overburden, as you recall, means earth and materials which lie above deposits of clay, limestone, sand and gravel, but also such earth and other materials disturbed from their natural state in the process of surface mining. Section 444.765(6). This second part of the definition of overburden would have no meaning unless it meant something other than earth and other materials which lie above the natural deposits of clay, limestone, sand and gravel. The only meaning is thus earth and other materials which may lie in layers between or within the natural deposits of clay, limestone, sand and gravel.

This interpretation follows subsection 2 of Section 444.770 which provides that the law only applies to those surface mining

Mr. Robert Neuenschwander

and pit areas which are opened on or after January 1, 1972, or to the extended portion of pits extended after that date. And a pit is defined as the place where clay, limestone, sand or gravel are being or have been removed.

Therefore, it is our opinion, in answer to your second question, that if all earth and other materials have been removed above natural deposits of clay, limestone, sand or gravel prior to January 1, 1972, and only pure deposits of clay, limestone, sand or gravel are thereafter being removed, with no further removal or disturbance of earth and other materials, then a permit is not required. However, if the reverse is true then a permit is required, and, in answer to your third question, this is so even though there is only vertical extension of the pit.

Obviously, if there is lateral extension to new, undisturbed ground a permit is required.

### III

Your fourth question reads as follows:

"4. Under HB 519, when a bond is required for the mining of clay or limestone, and the mining operation, after removal of overburden, may extend over many years with a plan of reclamation for a future lake in the open pit, is the bond required until such time as mining ceases and a lake is formed, or may the bond be released prior to that time?"

A bond is required by Section 444.772.1(1), reading in part as follows:

". . . The operator shall file with the commission a bond payable to the state of Missouri with surety satisfactory to the division in the penal sum of five hundred dollars for each acre or fraction thereof of the area of land affected, conditioned upon the faithful performance of the requirements set forth in sections 444.760 to 444.786 and of the rules and regulations of the commission. In a particular instance where the circumstances are such as to warrant an exception, the commission, in its discretion, may reduce the amount of the bond for a particular operation to less than the required amount."

Mr. Robert Neuenschwander

The purpose of the bond is to assure that reclamation practices imposed by Section 444.774 will be performed. See Section 444.778.1 which provides in part:

" . . . The penalty of such bond shall be five hundred dollars for each area or portion thereof of land proposed thereafter by the operator to be subjected to surface mining for the ensuing permit year. . . ."

Section 444.778 then provides, in part:

"2. The bond or security shall remain in effect until the mined acreages have been reclaimed, approved and released by the commission."

Accordingly, it is our opinion that anytime a permit is required, a bond is also required for any acreage covered by the permit and that bond must remain in effect and cannot be released until such time as all reclaiming has been completed, inspected, and finally released by the Commission. We do note that in any appropriate situation the bond can be reduced, Section 444.772(1), but this does not mean it could be reduced to zero, since this would in effect amount to releasing the bond prior to completion of reclamation, which cannot be done. The bond must at all times be of a sufficient amount which will, in the judgment of the Commission, insure complete compliance with the Land Reclamation Act and the rules and regulations of the Commission.

#### IV

Your fifth question reads as follows:

"5. Under HB 519, when a permit is obtained and the acreage fee is paid for the mining of clay or limestone on one acre, is a fee required on the same acre in subsequent years on application for a permit renewal if:

a. There is only vertical extension downward in the one-acre pit with no further removal of overburden; or

b. The first year of operation only part of the one-acre surface is disturbed and in the permit renewal year surface disturbance will only affect the remainder of the same acre?"

Mr. Robert Neuenschwander

An acreage fee is required as follows:

"(1) A basic permit fee of fifty dollars plus seventeen dollars and fifty cents for each acre or fraction thereof of the area of land to be affected by the operation shall be paid before the permit required herein shall be issued. . . ."  
Section 444.772.1(1)

Section 444.772.4 provides in part as follows:

"4. Where acreage for which a permit has been issued is being mined, and mining operations have not been completed thereon during the permit year, the permit as to such acreage may be renewed by applying on a permit renewal form furnished by the commission for an additional permit year and payment of a fee of fifty dollars. . . ."

The only acreage fee required to be paid is \$17.50 per acre when a permit is originally applied for.

Yours very truly,

JOHN C. DANFORTH  
Attorney General



PAUPERS:  
INDIGENTS:  
COUNTY COURTS:  
ANATOMICAL BOARD:

1. Sections 194.120 through 194.180, RSMo 1969, do not require that the State Anatomical Board accept the body of an indigent patient who dies in the State Chest Hospital.

2. When the State Anatomical Board is unable or unwilling to accept such body, the county court of the proper county is required to reimburse the State Chest Hospital for reasonable expenses incurred in the burial of such body. 3. The proper county within the meaning of Section 205.630, RSMo 1969, is that county in which the patient dies.

OPINION NO. 31

March 28, 1973

Herbert R. Domke, M.D., Director  
Missouri Division of Health  
Department of Public Health and Welfare  
Broadway State Office Building  
Jefferson City, Missouri 65101



Dear Dr. Domke:

This is in response to your request for a formal Attorney General's opinion regarding the following three questions:

1. In the event of the death of a patient receiving "free" treatment in the State Chest Hospital pursuant to Section 199.030, RSMo, can the State Anatomical Board refuse to accept the body after it has been properly notified under Section 194.150 that said hospital has custody of a pauper body?
2. Assuming that the State Anatomical Board properly can refuse to accept the body of a pauper who died in the State Chest Hospital, does said hospital under Section 205.630, RSMo, have authority to bill the county court for reimbursement of expenses incurred in the burial of such body?
3. Assuming that the State Chest Hospital is entitled to reimbursement for the expenses of such interment, which county is the "proper" county within the meaning of Section 205.630, RSMo, whose court is required to pay reasonable funeral expenses.

Herbert R. Domke, M.D.

With respect to your first question concerning whether the State Anatomical Board properly can refuse a pauper body, we must consider Section 194.150, RSMo 1969, which provides as follows:

"1. Superintendents or wardens of penitentiaries, houses of correction and bridewells, hospitals, insane asylums and poorhouses, and coroners, sheriffs, jailers, city and county undertakers, and all other state, county, town or city officers having the custody of the body of any deceased person required to be buried at public expense, shall be and hereby are required immediately to notify the secretary of the board, or the person duly designated by the board or by its secretary to receive such notice, whenever any such body or bodies come into his or their custody, charge or control, and shall, without fee or reward, deliver, within a period not to exceed thirty-six hours after death, except in cases within the jurisdiction of a coroner where retention for a longer time may be necessary, such body or bodies into the custody of the board and permit the board or its agent or agents to take and remove all such bodies, or otherwise dispose of them; provided, that each educational institution receiving a body from the board shall hold such body for at least thirty days, during which time any relative or friend of any such deceased person or persons shall have the right to take and receive the dead body from the possession of any person in whose charge or custody it may be found, for the purpose of interment, upon paying the expense of such interment.

"2. Each educational institution securing a dead body shall pay all necessary expense incurred in the delivery thereof, including cost of notice to the secretary of the board or his agent, which notice shall be by telegraph, when necessary to insure immediate notice. A correct record of all such bodies, including the name and date of death, shall be kept in a book provided for that purpose by the county clerk of the county in which such person died, and by the city health commissioner of the city of St. Louis, and such record shall be promptly

Herbert R. Domke, M.D.

furnished said officer by the person or persons reporting said bodies to the secretary of the board or his agent.

"3. Whenever any person fails to give the notice and deliver the body of a deceased person as required by this section, and by reason of such failure such body shall become unfit for anatomical purposes, and is so certified by the duly authorized officer or agent of the board, such body shall be buried at the expense of the person so failing to notify and deliver such body."

This section requires notification to the State Anatomical Board, provides for payment of the delivery expenses by the educational institution receiving a cadaver, or payment of burial expenses by persons whose failure properly to notify the State Anatomical Board renders the body unfit for anatomical use.

Section 194.120(1) designates what persons constitute the State Anatomical Board. Subsection 2 states:

"The board shall have exclusive charge and control of the disposal and delivery of dead human bodies, as described in sections 194.120 to 194.180, to and among such educational institutions as under the provisions of said sections are entitled thereto."

Initially it would appear that the words "shall have exclusive charge and control" could be interpreted in the manner which would preclude the State Anatomical Board from refusing the body of a pauper. However, that "exclusive charge and control" is restricted to "disposal and delivery of dead human bodies" to and among the educational institutions entitled to receive them. It is our opinion that this language merely provides that the State Anatomical Board is the sole agency authorized to determine which educational institution is to receive a cadaver. A conclusion that Section 194.120 prohibits refusal of pauper bodies is not supported by the language of this section.

Section 194.170, however, provides as follows:

"Bodies required to be buried at public expense shall be under the exclusive custody and control of the board. It is hereby declared unlawful for any person or persons to hold any

Herbert R. Domke, M.D.

autopsy on any dead human body subject to the provisions of sections 194.120 to 194.180 without first having obtained the consent of the secretary of the board or his accredited agent. The consent of any person for an autopsy on his or her body shall not in any way prevent or affect the application of sections 194.120 to 194.180."

Again, because of the phrase "exclusive custody and control," it would appear that under this section the State Anatomical Board cannot refuse a pauper body. However, the title and the remainder of the section indicate that the legislature meant only to require that the secretary of the State Anatomical Board consent to an autopsy on a pauper body over which the State Anatomical Board was in fact exercising control. This interpretation is in consonance with the apparent purpose of Sections 194.120 through 194.180; that is, to establish an orderly method by which bodies can be distributed on a proportional basis to educational institutions in which human anatomy is taught. In the event that the educational institutions are not in need of cadavers as they become available, it is our view that the State Anatomical Board can refuse to take custody of the body, even though the board has been notified properly under Section 194.150. This view is consistent with the view expressed in Opinion No. 33 dated March 23, 1966, directed to Paul McGhee, a copy of which is enclosed.

Regarding your second question dealing with the authority of the State Chest Hospital to bill the county court for burial expenses of paupers, we must examine Section 205.630, RSMo 1969, which provides as follows:

"The county court of the proper county shall allow such sum as it shall think reasonable, for the funeral expenses of any person who shall die within the county without means to pay such funeral expenses."

A practical interpretation of this section in conjunction with the provisions concerning disposition of pauper bodies through the State Anatomical Board indicates that the state, county, city or town officers, as well as the superintendents or wardens of the institutions and agencies designated in Section 194.150, must notify the State Anatomical Board whenever a pauper body comes into their custody, charge or control. Once notified, the board, whose responsibility it is to distribute those bodies, is entitled to determine that none are needed in the educational institutions and therefore refuse to accept the bodies so offered. Under those circumstances,

Herbert R. Domke, M.D.

of course, someone is responsible for the disposition of the body. The provisions of Section 205.630 clearly require that the county court pay the expenses of burial for those persons dying without means.

It is our view that when a free patient dies in the State Chest Hospital, the superintendent thereof must notify the State Anatomical Board pursuant to Section 194.150. If the State Anatomical Board is unable or unwilling to accept the body offered, the body can be interred in the hospital cemetery. Since the county court of the proper county is required to pay the funeral expenses of persons dying without means within the county, it would be appropriate for the State Chest Hospital to bill the proper county court for reimbursement of burial expenses.

In order to consider your third question, concerning which county is the proper county, it would be helpful to reexamine Section 205.630 which states as follows:

"The county court of the proper county shall allow such sum as it shall think reasonable, for the funeral expenses of any person who shall die within the county without means to pay such funeral expenses." (emphasis added)

By virtue of the phrase "funeral expenses of any person who shall die within the county," it would appear that the county court responsible to pay funeral expenses would be that county in which the indigent died. Applied to the factual context of your opinion request, that would mean that the burial expenses of all persons who die without means in the State Chest Hospital whose bodies are refused by the State Anatomical Board will be borne by the county court of Lawrence County.

#### CONCLUSION

It is the opinion of this office concerning indigent patients who die in the State Chest Hospital that:

1. Sections 194.120 through 194.180, RSMo 1969, do not require that the State Anatomical Board accept a pauper body.
2. When the State Anatomical Board is unable or unwilling to accept a pauper body, the county court of the proper county is required to reimburse the State Chest Hospital for reasonable expenses incurred in the burial of such body.
3. The proper county within the meaning of Section 205.630, RSMo 1969, is that county in which the patient dies.

Herbert R. Domke, M.D.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Karen Harper.

Yours very truly,

A handwritten signature in black ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 33  
3-23-66, McGhee



COURT RECORDS:  
CIRCUIT COURTS:  
PUBLIC RECORDS:

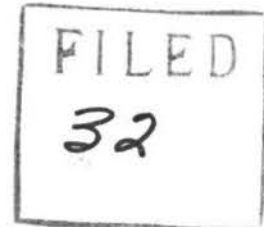
Circuit clerks are authorized to microfilm closed case files more than five years old when authorized to do so by the circuit

judge or judges. Circuit court files in all cases which have been closed and no action taken for more than ten years, and which have been reproduced in accordance with Section 109.120, RSMo, may be destroyed under the authority and direction of the judge or judges of the circuit court.

OPINION NO. 32

May 16, 1973

Honorable William S. Brandom  
Prosecuting Attorney, Clay County  
Clay County Courthouse  
Liberty, Missouri 64048



Dear Mr. Brandom:

This is in reply to your request for an opinion of this office concerning the question of the circumstances under which a circuit clerk is authorized to microfilm records of the circuit court and destroy the originals.

Section 109.120, RSMo, reads in part as follows:

"1. . . . the judges and justices of the several courts of record within this state may cause all closed case files more than five years old to be photographed, microphotographed, photostated, or reproduced on film. Such film or reproducing material shall be of durable material and the device used to reproduce the records on film or material shall be such as to accurately reproduce and perpetuate the original records in all details."

Accordingly, it is our opinion that the circuit court, at its discretion, may have closed case files more than five years old microfilmed.

Then Section 109.140, V.A.M.S. provides in part as follows:

"2. The supreme court may authorize the disposal, archival storage or destruction of its own closed court files more than five years old and such files of the several courts of records when the photostatic copies, photographs, microphotographs or



Honorable William S. Brandom

reproductions on film are placed in conveniently accessible files and provisions made for preserving, examining and using them."

On March 10, 1956, the Supreme Court pursuant to Section 109.140(2) issued the following order:

"The disposal, archival storage or destruction of court files of the Circuit Courts in all cases which have been closed and no action taken for more than ten years is hereby authorized, provided:

1. Such files are reproduced in accordance with Section 109.120, RSMo 1959, V.A.M.S.

2. The reproductions are placed in conveniently accessible files, and provisions are made for preserving, examining and using them.


3. All action taken with respect thereto shall be under the authority and direction of the Judge or Judges of the Circuit Court, and any rules, or methods of preservation, and examination and use, or fees charged for reproducing shall be fixed by such Circuit Court."

#### CONCLUSION

Accordingly, it is our opinion that circuit clerks are authorized to microfilm closed case files more than five years old when authorized to do so by the circuit judge or judges. Circuit court files in all cases which have been closed and no action taken for more than ten years, and which have been reproduced in accordance with Section 109.120, RSMo, may be destroyed under the authority and direction of the judge or judges of the circuit court.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

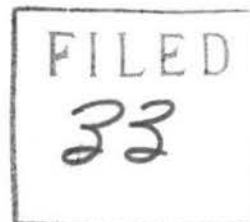
Very truly yours,

  
JOHN C. DANFORTH  
Attorney General

FEES: The State Highway Commission  
LICENSES: must now pay, pursuant to  
STATE HIGHWAY COMMISSION: Section 204.051, V.A.M.S.,  
CLEAN WATER COMMISSION: enacted in 1972, an annual fee  
of \$25.00 for a permit to  
operate a lagoon for sanitary facilities at a rest area on  
state owned land on Interstate 70 in Lafayette County, which  
permit was originally issued on May 1, 1967.

OPINION NO. 33

January 5, 1973



Mr. Robert L. Hyder, Chief Counsel  
State Highway Commission of Missouri  
Jefferson City, Missouri 65101

Dear Mr. Hyder:

This is in reply to your request for an official opinion of this office concerning the question whether the State Highway Commission which obtained an operating permit May 1, 1967 for the purpose of operating a lagoon at a rest area on state owned land on Interstate 70 in Lafayette County is required under provisions of Section 204.051, V.A.M.S., to pay to the Missouri Clean Water Commission a fee of \$25.00 for renewal of such permit.

The permit, when originally issued in 1967, was issued pursuant to Section 204.030, RSMo 1969, and the "Missouri Water Pollution Board Regulations Pertaining to Issuance of a Permit", pp 19-23, Missouri Water Pollution Law and Regulations published by the Department of Public Health and Welfare of Missouri and the Missouri Water Pollution Board.

Since then Chapter 204 has been substantially amended by repeal and re-enactment. S.C.S.S.B. No. 424, Second Regular Session, Seventy-Sixth General Assembly.

Section 204.051, V.A.M.S., of the new law, still requires operating permits, reading in part as follows:

\* \* \*

"2. It shall be unlawful for any person to . . . operate, use or maintain any water contaminant source in this state that is subject

Mr. Robert L. Hyder

to standards, rules or regulations promulgated pursuant to the provisions of this act unless he holds a permit from the Commission, subject to such exceptions as the Commission may prescribe by rule or regulations."

\* \* \*

"Person" includes any agency, board, department or bureau of the state government, and thus includes the State Highway Commission. Section 204.010(4), V.A.M.S.

Section 204.126, V.A.M.S., of the new law provides:

"All standards, rules, regulations, and orders of the Water Pollution Board presently existing shall remain in effect as actions of the Clean Water Commission until such time as the Clean Water Commission may adopt new standards, rules and regulations, which they are hereby instructed to do."

Since the new Commission has not, as of this date, adopted new standards, rules and regulations, the old regulations requiring a permit are still in effect and conform to the new Section 204.051 requiring operating permits.

Thus, the facility for which you have had an operating permit since May 1, 1967 must still have an operating permit. This you apparently agree to. However, you question whether the State Highway Commission must now pay an annual fee for such permit.

Section 204.051 provides in part:

\* \* \*

"9. There shall be a twenty-five dollar fee payable to the State of Missouri with each application for a construction or operating permit before a permit shall be issued. Operating permits shall continue from year to year after date of issuance upon the payment of an annual fee of twenty-five dollars, unless revoked by the commission, . . ."

\* \* \*

This provision does not exempt a state agency, board, department, or bureau of the state government from paying

Mr. Robert L. Hyder


the operating fee. Nor does the fact that the permit in question was issued prior to the requirement of the fee exempt payment here. The present permit continues under the new law from year to year, subject only to the new condition of payment of the annual fee. This operating permit is not now, since the date of the new law, any different, or in any different status than a permit issued after the date of the new law.

CONCLUSION

Accordingly, it is the opinion of this office that the State Highway Commission must now pay, pursuant to Section 204.051, V.A.M.S., enacted in 1972, an annual fee of \$25.00 for a permit to operate a lagoon for sanitary facilities at a rest area on state owned land on Interstate 70 in Lafayette County, which permit was originally issued on May 1, 1967.

The foregoing opinion which I hereby approve was prepared by my assistant Walter W. Nowotny, Jr.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

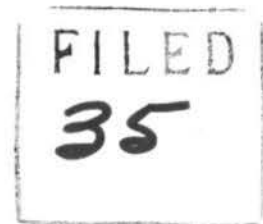
ANIMALS:  
AGRICULTURE:  
STATE VETERINARIAN:  
CONFLICT OF INTEREST:

The payment of an indemnity to a state official for an incurred hurt, loss or damage under any provision of law when the same indemnity is available to all private citizens for identical hurts, losses or damages does not constitute a conflict of interest.

OPINION NO. 35

December 14, 1973

Honorable John D. Ashcroft  
State Auditor  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Ashcroft:

This opinion comes in response to a request made by your predecessor in office as to whether a conflict of interest arises under the provisions of Sections 105.490 or 105.495, RSMo 1969, when the state veterinarian certifies for payment an indemnity claim for personally owned livestock under the Brucellosis Control and Eradication Law, Sections 267.470 et seq., RSMo 1969, or the Livestock Disease Control and Eradication Law, Sections 267.560 et seq., RSMo 1969.

The facts underlying this opinion request are as follows:

1. In conjunction with a cooperative agreement entered into between the Missouri Department of Agriculture and the United States Department of Agriculture, the Missouri Department of Agriculture set up a brucellosis eradication program under the provisions of the Livestock Disease Control and Eradication Law. Under this program, the following standards were set forth by the United States Department of Agriculture, the Missouri Department of Agriculture, and the State Veterinarian governing the payment of indemnities on animals exposed to or infected with brucellosis:

"A. Reactor Animals

1. \$50.00 on grade animals (including grade bulls)
2. \$100.00 on registered animals (registration certificate must accompany indemnity claim)

Honorable John D. Ashcroft

3. If owner requests, young calves on reactor cows may also be branded and indemnified in the amount of \$50.00 and shipped to slaughter. (This is to facilitate the immediate removal of all reactor animals and eliminate the requests to retain a reactor animal until her calf reaches weaning age.)
4. Indemnity is available to Missouri owners on brucellosis reactors disclosed at livestock markets. To facilitate processing and payment of claims, forward one completed set and one blank set of ANH Form 1-23, both signed by the owner and the veterinarian. The ANH Form 1-27 is to be completed and attached to the Mo. DAV-11 or to the ANH Form 4-33. Reactors are to be tagged and branded and consigned to slaughter. One market to market movement will be allowed.
5. Appraisal of animals is not required in view of established indemnities paid.
6. Indemnity claims for reactor animals are to be submitted on separate ANH Form 1-23 from negative exposed animals.

"B. Suspect Animals

Same as above

"C. Exposed Animals

1. Complete herd depopulations

Entire breeding herd (including replacement heifers) will be branded and indemnified.

2. Partial depopulations

Negative animals, culled from an infected herd may be branded and indemnified (as a reactor animal) and shipped to slaughter along with the

Honorable John D. Ashcroft

reactors, with prior approval from the State Veterinarian's office.

"D. All animals for which indemnity is claimed, will be branded and tagged and shipped to slaughter within 15 days.

"E. Branding on the farm may be waived if animals move under direct supervision to a slaughtering establishment.

1. Branding of all reactors, suspects, and negative exposed animals is the responsibility of the District Veterinarian. However, whenever mutually agreed upon, may be performed by the practicing veterinarian on a fee basis.

"F. Cattle which have moved interstate will be eligible for indemnity providing:

They have been in Missouri for a minimum of 30 days, and the owner has evidence of a negative brucellosis test conducted by an approved laboratory within 30 days of entry.

"G. At the time the required quarantine is issued on all reactor herds, the herd owner is to be reminded that no quarantined animals are to be removed without shipping permit to slaughter or prior approval of the State Veterinarian.

Refer to Paragraph C 2 on partial depopulation.

"H. Where Federal funds are involved, requirements of CFR, Part 51, shall be met.

"I. All claims and allied papers are to be submitted to: USDA [United States Department of Agriculture], APHS [Animal and Plant Health Service], VS [Veterinary Services], Box 1027, Jefferson City, Missouri 65101."



Honorable John D. Ashcroft

2. If the presence of brucellosis were detected or suspected in a herd, it would be tested for brucellosis by a deputy state veterinarian. Blood samples would be drawn from individual animals and forwarded to a state laboratory for testing. The testing procedure at the laboratory involves a two-step process. The blood sample is initially subjected to a "screen" test. If there is a negative reaction to this test, the test is concluded and the animal from which the sample was taken is determined not to be a diseased animal. However, if there is a positive reaction to the "screen" test, a secondary test is conducted on the sample. A positive reaction to the second test as well as the first means the animal from which the sample was taken is a reactor or a positive carrier of brucellosis. A negative reaction to the second test along with a positive reaction on the first test means that the animal is a suspected carrier of brucellosis.

3. If it were determined by testing that any animals in a herd were carriers of brucellosis, the entire herd was placed under quarantine for a certain period. The entire herd could then be branded as reactors and slaughtered and indemnified. If this step were not taken, all of the reactor animals and suspect animals would be segregated and slaughtered and indemnified. At the end of the quarantine period, blood samples would again be taken from the remaining animals in the herd and forwarded to a state laboratory for testing. If no carriers of brucellosis were detected, the quarantine of the herd would be lifted.

4. If, for any reason, the herd owner wished to sell some or all of the exposed animals in a quarantined herd, i.e., animals which had been exposed to brucellosis but tested negative on the "screen" test, he would be allowed to sell them for slaughter and claim an indemnity as long as they were branded as reactors. In order to accomplish this, the herd owner would contact the deputy state veterinarian in his area who would then telephone the state veterinarian for authorization. Authorization was always given when requested and a form "permission to move" such livestock was issued.

5. Indemnities were uniformly paid by the Department of Agriculture to all owners who slaughtered their reactors, suspect animals, and exposed animals under quarantine.

6. During the period of October, 1971 through September, 1972, the state veterinarian received appropriately \$14,000 in indemnity payments for personally owned cattle which were slaughtered under the provisions of the brucellosis eradication program. Indemnities were claimed on approximately 279 head of personally owned cattle, 163 of which were determined to be positive carriers

Honorable John D. Ashcroft

or reactors, 17 of which were determined to be suspect carriers, and 99 of which were exposed cattle belonging to herds under quarantine.

A discussion of the principles of law surrounding the payment of indemnities to state officials would be in order at this point. Our research does not disclose any statute which expressly forbids the payment of an indemnity to a state official. The only possible restrictions would be the provisions of the conflict of interest laws, Sections 105.490 or 105.495, RSMo 1969.

Section 105.490, in pertinent part, reads:

"1. No officer or employee of an agency shall transact any business in his official capacity with any business entity of which he is an officer, agent or member or in which he owns a substantial interest; nor shall he make any personal investments in any enterprise which will create a substantial conflict between his private interest and the public interest, nor shall he or any firm or business entity of which he is an officer, agent or member, or the owner of substantial interest, sell any goods or services to any business entity which is licensed by or regulated in any manner by the agency in which the officer or employee serves."

Section 105.495, in pertinent part, reads:

"No officer or employee of an agency shall enter into any private business transaction with any person or entity that has a matter pending or to be pending upon which the officer or employee is or will be called upon to render a decision or pass judgment. If any officer or employee is already engaged in the business transaction at the time that a matter arises, he shall be disqualified from rendering any decision or passing any judgment upon the same.  
. . ."

It seems clear that the purpose of these provisions is to prevent an individual from transacting business between himself as an individual and an agency in which he holds official capacity and to prevent business transactions between an official and a private enterprise which has matters pending before his agency. The question then is whether the payment of an indemnity to a state official constitutes a "business transaction" as that term is used in the conflict of interest laws.

Honorable John D. Ashcroft

A business transaction can best be defined as the engagement in the purchase or sale of commodities or service. In its purest sense, an indemnity is simply compensation for an incurred hurt, loss or damage. When an event occurs which would entitle a state official to the payment of an indemnity by the state in the same manner as any other citizen of this state, we fail to see that such compensation would constitute a "business transaction."

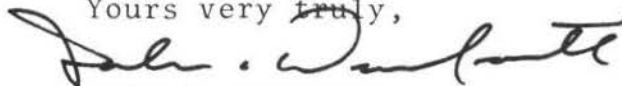
The key is uniform application of the indemnity provisions under the law. The indemnity payment must be authorized by statute or lawfully constituted regulation, and the state official involved cannot have exercised his discretion so as to allow himself the payment of an indemnity where none would be allowed to a private citizen.

Applying these principles to the facts at hand, we are of the opinion that the state veterinarian did not violate the conflict of interest laws by presenting his claim for and accepting indemnity payments for privately owned cattle which were slaughtered pursuant to the brucellosis eradication program. In reaching this conclusion, we are mindful of the potential for abuse in this particular matter because of the powers and duties of the state veterinarian. However, we have not been presented with any information which would lead us to believe that the state veterinarian acted in his official capacity in a manner calculated to increase his personal fortunes at the expense of the state. We have found nothing in the Missouri law which would prevent the state veterinarian from owning and raising cattle in his individual capacity. When an event occurs which would entitle him to the payment of an indemnity by the state, we fail to see that seeking and accepting such compensation would constitute a conflict of interest.

#### CONCLUSION

It is the opinion of this office that the payment of an indemnity to a state official for an incurred hurt, loss or damage under any provision of law when the same indemnity is available to all private citizens for identical hurts, losses or damages does not constitute a conflict of interest.

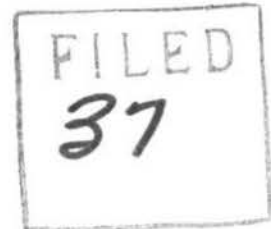
The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard L. Wieler.

Yours very truly,  
  
JOHN C. DANFORTH  
Attorney General

December 13, 1973

OPINION LETTER NO. 37  
Answer by Letter Lindholm

Honorable N. William Phillips  
Prosecuting Attorney  
Sullivan County  
Milan, Missouri 63556



Dear Mr. Phillips:

This letter is to acknowledge receipt of your request for an opinion from this office with regard to whether a fourth class city in Missouri may comply with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Act, Public Law No. 91-646, so that the city may be eligible for a grant from the Economic Development Agency for water system improvements.

Public Law 91-646 which may be cited as the "Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970" and hereinafter referred to as the Act, was legislation passed by Congress to provide for uniform and equitable treatment of persons displaced from their homes, businesses, or farms by federal and federally assisted programs and to establish uniform and equitable land acquisition policies for federal and federally assisted programs. See U.S. Code Congressional and Administrative News, Volume 2, page 2222.

Title II of the Act refers to uniform relocation assistance. In general, the following categories of assistance are provided for: (1) moving expenses from homes, businesses and farm operations (Section 202); (2) replacement housing for tenants (Section 204). This assistance is required to be provided by any state agency receiving federal funds for any project resulting in displacement of any person after July 1, 1972 (Section 210).

Title III of the Act refers to uniform real property acquisition policy. In this regard, Section 305 of the Act provides

Honorable N. William Phillips

that state agencies administering programs receiving federal financial assistance must be guided to the greatest extent practicable under state law, by the land acquisition policies set forth in Sections 301 and 302 of the Act, as a condition of such federal assistance. In addition, Section 306 of the Act provides that state agencies administering programs receiving federal financial assistance must provide for reimbursement of the owner for expenses incidental to transfer of title and for reasonable expenses of litigation. The economic Development Administration must have assurances of this assistance from Milan before making any grant.

We understand that at least a substantial portion of the funds which would be used for the water system improvements contemplated in your request would be provided through the EDA grant under consideration. In Opinion Letter No. 314, rendered September 29, 1971, to Robert L. Dunkeson, we reached the following conclusion:

"Article III, Section 38(a), Constitution of Missouri, provides in part:

' . . . Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States.'

"While we are not aware of any legislative implementation of this constitutional provision applicable to state agencies and political subdivisions generally that would specifically authorize use of state or local funds for the relocation assistance contemplated by the federal act, we believe the constitutional provision is a self-executing grant of power and adequate to authorize all state agencies and political subdivisions to use their funds, in combination with federal outdoor recreational funds, for such relocation assistance purposes.

"Accordingly, we are of the opinion that the Inter-Agency Council for Outdoor Recreation can require assurances from each state agency and political subdivision applying for, and receiving federal funds administered by the Council through the Inter-Agency Council Fund, that the agency or public entity will provide the relocation assistance described in the



Honorable N. William Phillips

Uniform Relocation Assistance Act. (P.L. 91-646). We are further of the opinion that the Inter-Agency Council may assure the Bureau of Outdoor Recreation, United States Department of the Interior, that state and local funds may, consistent with the laws of Missouri, be used together with federal funds to provide the relocation assistance required by such federal law."

While that Opinion No. 314 specifically dealt with a state agency instead of a political subdivision, its reasoning clearly is applicable to political subdivisions, which would therefore enable a fourth class city, to provide the relocation assistance described in the Uniform Relocation Assistance Act (P.L. 91-646) and give the assurances to the Economic Development Administration necessary as a condition to receipt of federal grant funds from the Economic Development Administration to be used with public funds of a fourth class city for the water system improvements contemplated in your request.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

ELECTIONS:  
RESIDENCE:  
TAXATION (INCOME):

An individual domiciled in this state who is absent from this state and who is eligible to receive a Missouri absentee ballot

for President and Vice President will be subject to the Missouri income tax law unless he (1) does not maintain a permanent place of abode in this state, (2) does maintain a permanent place of abode outside this state, (3) does not spend in the aggregate more than thirty days during the taxable year in this state, and (4) does not receive income derived from or connected with sources within this state, as defined in Section 143.181, Senate Bill No. 549, 76th General Assembly, Second Regular Session. Tax liability, if it exists, is present regardless of whether a person exercises his right to vote or not, and therefore the act of voting, by itself, does not determine whether a person is subject to the Missouri income tax law.

OPINION NO. 38

February 14, 1973

Honorable L. Edward Stone, Jr.  
State Senator, District 26  
Room 419A, Capitol Building  
Jefferson City, Missouri 65101



Dear Senator Stone:

This opinion is in response to your request for a ruling on the following question:

"Does a former resident of Missouri who is out of the country on a temporary assignment who receives an absentee ballot to vote for President and Vice President subject himself to Missouri income taxes by virtue of such absentee voting?"

The facts giving rise to this opinion request are that this office last year issued two opinions, Opinion No. 277 to Wiley, dated October 16, 1972 and Opinion No. 289 to Young, dated November 3, 1972, in which we said that certain legal residents of Missouri who were not registered voters could receive absentee ballots for President and Vice President. While your opinion request speaks in terms of "former residents," under Missouri and federal statutes, only persons who are legally residents or domiciliaries of Missouri\*

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\*". . . The words 'residence' and 'domicile' [for voting purposes] may be used interchangeably . . . because they are synonymous insofar as they apply to the situation here presented. . . ." State ex rel. King v. Walsh, 484 S.W.2d 641, 644 (Mo. banc 1972)



Honorable L. Edward Stone, Jr.

may receive ballots in Missouri elections. (There is one exception to this: persons who have moved from Missouri within 30 days of an election and who are not eligible to vote in their new residences may receive a ballot for President and Vice President despite the fact that they are no longer residents of Missouri. Section 111.031(2), RSMo Supp. 1971.)

This opinion will, therefore, deal with persons whose voting residence is within the state of Missouri, but who are absent from the state. The question you ask is whether these persons are subject to Missouri state income taxes.

In Senate Bill No. 549, 76th General Assembly, Second Regular Session (Chapter 143, V.A.M.S.), the General Assembly completely revised the Missouri income tax law. The new law became effective on January 1, 1973 and applies with some exceptions to all taxable years beginning on or after January 1, 1973. Section B. This opinion will answer your question as it is controlled by Senate Bill No. 549 and all section references are to Senate Bill No. 549.

Tax liability under the income tax law is determined by the "Missouri taxable income of every resident" and "the income of every nonresident individual which is derived from sources within the state." Sections 143.011 and 143.041. Therefore, to answer your question, we must determine whether people who receive absentee ballots are "residents" or "nonresidents" as defined in the income tax law.

The terms "resident" and "nonresident" are defined in Section 143.101, as follows:

"1. 'Resident' means an individual who is domiciled in this state, unless he (1) maintains no permanent place of abode in this state, (2) does maintain a permanent place of abode elsewhere, and (3) spends in the aggregate not more than thirty days of the taxable year in this state; or who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state.

"2. 'Nonresident' means an individual who is not a resident of this state."

As stated in the opinions dealing with voting cited above, only persons who are domiciled in the voting sense in Missouri

Honorable L. Edward Stone, Jr.

may receive absentee ballots for Missouri election officials. Voting domicile is a term which describes the place which a person considers to be his permanent home or place to which he plans to return. State ex rel. King v. Walsh, supra. It is our belief that the legislature used the word "domicile" in this sense in the income tax law, since the legislature then limited the inclusive nature of this term by adding an exception which makes some domiciliaries nonresidents for income tax purposes.

A person who receives an absentee ballot has, by his application, declared himself to be domiciled in Missouri, and therefore, he will be a resident for tax purposes unless he fits into the exception of Section 143.101(1). This exception provides that if a person's permanent place of abode is outside Missouri and he has no permanent place of abode in Missouri and he spends no more than thirty days of the taxable year in Missouri, then he is a nonresident for income tax purposes, even though he may be domiciled in Missouri and may have voted in a Missouri election. (To satisfy the exception, a person must meet all of its provisions, not just one or two.)

It should be noted that these definitions of "resident" and "nonresident" do not depend in any way upon the actual exercise of the right to vote by absentee ballot. The same facts which make a person eligible to vote may make him a resident for tax purposes and vice versa, but a person incurs no tax liability by voting, nor may he avoid owing a tax by giving up his vote. Both voting residency and tax residency are determined by reference to a person's domicile and permanent place of abode.

If the absentee voter is a nonresident of Missouri for tax purposes as defined in Section 143.101, he may still be required to pay Missouri income taxes, but only on income "derived from sources within this state" as defined in Section 143.181.

#### CONCLUSION

It is therefore the opinion of this office that an individual domiciled in this state who is absent from this state and who is eligible to receive a Missouri absentee ballot for President and Vice President will be subject to the Missouri income tax law unless he (1) does not maintain a permanent place of abode in this state, (2) does maintain a permanent place of abode outside this state, (3) does not spend in the aggregate more than thirty days during the taxable year in this state, and (4) does not receive income derived from or connected with sources within this state, as defined in Section 143.181, Senate Bill No. 549, 76th General Assembly, Second Regular Session. Tax liability, if it exists, is

Honorable L. Edward Stone, Jr.

present regardless of whether a person exercises his right to vote or not, and therefore the act of voting, by itself, does not determine whether a person is subject to the Missouri income tax law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 277  
10-16-72, Wiley

Op. No. 289  
11-3-72, Young

TAXATION (CITY SALES):  
CITIES, TOWNS & VILLAGES:

The governing body of a city may abolish a city sales tax previously imposed as provided in Sections 94.500 to 94.570, RSMo 1969, by repealing the ordinance imposing the tax, without a subsequent vote of the qualified electors on the question of abolition.

OPINION NO. 39

January 3, 1973

Honorable Edna Eads  
State Representative  
112 South Pine  
Bonne Terre, Missouri 63628



Dear Representative Eads:

This official opinion is issued in response to your request for a ruling on the following question:

"What procedure must be followed for a city to abolish a city sales tax previously imposed as provided in Sections 94.500 to 94.570, Revised Statutes of Missouri. More specifically, can the governing body of the city abolish it by repealing the ordinance imposing the tax, or will a vote of the qualified electors on the question of abolition be required?"

The question arises from the following factual situation, as stated in your request:

"The city of Flat River, after an affirmative vote of the people, imposed a city sales tax on July 1, 1972. Certain persons have indicated interest in the possible repeal of this tax, but sections 94.500 to 94.570 do not set out any procedures to be followed to accomplish this repeal."

Section 94.510(1), RSMo 1969, sets forth the procedure by which a city may impose a city sales tax:

"1. Any city may, by a majority vote of its council or governing body, impose a city

Honorable Edna Eads

sales tax for the benefit of such city in accordance with the provisions of sections 94.500 to 94.570; provided, however, that no ordinance enacted pursuant to the authority granted by the provisions of sections 94.500 to 94.570 shall be effective unless the legislative body of the city submits to the voters of the city, at a city or state general, primary or special election, a proposal to authorize the legislative body of the city to impose a tax under the provisions of sections 94.500 to 94.570.

"The ballot of submission shall contain, but not be limited to, the following language:

- ☐ For the sales tax
- ☐ Against the sales tax

If a majority of the votes cast on the proposal by the qualified voters voting thereon are in favor of the proposal, then the ordinance and any amendments thereto shall be in effect. If a majority of the votes cast by the qualified voters voting are opposed to the proposal, then the legislative body of the city shall have no power to impose the tax herein authorized unless and until the legislative body of the city shall again have submitted another proposal to authorize the legislative body of the city to impose the tax under the provisions of sections 94.500 to 94.570, and such proposal is approved by a majority of the qualified voters voting thereon."

Although Sections 94.500 to 94.570 do not provide a specific procedure for repeal of such ordinance, Section 94.550(2) clearly contemplates such a repeal:

"2. The director of revenue may authorize the state treasurer to make refunds from the amounts in the trust fund and credited to any city for erroneous payments and overpayments made, and may authorize the treasurer to redeem dishonored checks and drafts deposited to the credit of such cities. If any city abolishes the tax, the city shall notify the

Honorable Edna Eads

director of revenue of the action at least ninety days prior to the effective date of the repeal and the director of revenue may order retention in the trust fund, for a period of one year, of two percent of the amount collected after receipt of such notice to cover possible refunds or overpayment of the tax and to redeem dishonored checks and drafts deposited to the credit of such accounts. After one year has elapsed after the effective date of abolition of the tax in such city, the director of revenue shall authorize the state treasurer to remit the balance in the account to the city and close the account of that city. The director of revenue shall notify each city of each instance of any amount refunded or any check redeemed from receipts due the city."  
(Emphasis added)

We conclude, initially, that a city which has imposed a city sales tax may subsequently abolish it.

The principle is well established that authorization must be found before a referendum can be held by a city on an ordinance enacted by such city.

In the case of City of Mt. Olive v. Braje, 7 N.E.2d 851 (Ill. 1937), the Supreme Court of Illinois said, l.c. 853:

"The legal voters of any such municipality have no inherent or constitutional right to require the governing body to submit any legislation to a referendum. Such requirements exist only by virtue of statutory provisions which the Legislature has the right to impose or withhold. The wisdom of requiring a question to be submitted under certain circumstances, and not under others, is a matter for legislative determination, and not for the courts. . . ."

We conclude, then, that unless Sections 94.500 to 94.570, RSMo 1969, specifically require a referendum upon the abolition as well as the imposition of a city sales tax, no such referendum upon such abolition of such tax may be had.

There remains the question of whether, because Section 94.510 (1), RSMo 1969, requires a referendum upon the imposition of a city



Honorable Edna Eads

sales tax by ordinance of the governing body of such city, such section does require such a referendum upon the abolition of that city sales tax. Our conclusion is in the negative.

In the case of In re Condemnation of Property for Park in City of St. Joseph, 263 S.W. 97 (Mo. Banc 1924), the court said, l.c. 102:

"The validity of Ordinance No. 8690, under which these proceedings were had, is assailed and, as a consequence, that the court was without jurisdiction to proceed thereunder. It is not contended that the ordinance is not fair on its face, but that it was enacted by the common council without a vote of the people, and therefore, it did not repeal Ordinance No. 8581, which had been referred to and adopted by the people after having been enacted by the council.

". . . [A]n ordinance enacted under the initiative [Section 7950, RSMo 1919] must be proposed by the people and adopted by them. Such an ordinance cannot be repealed or amended, except by a vote of the people.

"There is an absence of this limitation in section 7951 regulating the submission of ordinances to the people for their approval or rejection which have been enacted by the council. . . . Having been enacted and approved, it [an ordinance] is nevertheless equally subject to the legislative will as to amendment or repeal as though it had not been referred. . . . Legislative action concerning a referred statute, whether it be state or municipal, is held in abeyance only until after it has been approved or rejected by the people. . . ."

From the above authorities it is evident that the governing body of a city may repeal its ordinance imposing a city sales tax, and that such repeal will be effective without being referred to a vote of the people.

#### CONCLUSION

Therefore, it is the opinion of this office that the governing body of a city may abolish a city sales tax previously imposed



Honorable Edna Eads

as provided in Sections 94.500 to 94.570, RSMo 1969, by repealing the ordinance imposing the tax, without a subsequent vote of the qualified electors on the question of abolition.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

November 6, 1973

OPINION LETTER NO. 41

Honorable L. Edward Stone, Jr.  
State Senator, 26th District  
53 River Bend Court  
Chesterfield, Missouri 63017

Dear Senator Stone:

This letter is issued in response to your request for a ruling on whether the minimum qualifications to qualify as the superintendent of a six-director school district in a first-class county as specified in Section 168.191, RSMo 1969, are constitutional.

The qualifications about which you inquire were set forth in the second sentence of Section 168.191, RSMo 1969:

" . . . The superintendent of schools so employed in the district shall have had not less than five years' experience as the chief administrative officer of a school system working under the direction of a board of education and having administrative charge of all public schools within a six-director district, in which one-half or more of his time was devoted to administrative or supervisory duties, or shall have been employed as a teacher in the immediate high school district for a period of two years or more. . . ."

Honorable L. Edward Stone, Jr.

These qualifications were repealed by House Bill No. 158, Seventy-Seventh General Assembly, First Regular Session, which becomes effective on July 1, 1974. After that date, a six-director school district in a first-class county not having a charter form of government may hire a superintendent without reference to the qualifications previously set forth in Section 168.191, RSMo 1969. Section 168.191, as amended by House Bill No. 158, reads as follows:

"In all counties of the first class except counties of the first class not having a charter form of government, any board of education, other than boards in urban districts, in charge of a public school system maintaining a classified high school, previously approved by the state board of education, and employing a superintendent devoting his full time to supervisory and administrative work, may employ and enter into contract with a superintendent of schools for the school district for a period of not to exceed three years. This law shall not invalidate or repeal any other law of this state relating to the employment of teachers, principals or superintendents of public schools."

Because the legislature has repealed, as of July 1, 1974, the minimum qualifications to qualify for employment as a school superintendent in a first-class county about which you inquire, we believe it is particularly appropriate to accord the existing Section 168.191 the presumption of constitutionality usually accorded to enactments of the General Assembly. State ex rel. Priest v. Gunn, 326 S.W.2d 314, 324 (Mo. en banc 1959), and Borden Company v. Thomason, 353 S.W.2d 735 (Mo. en banc 1962).

Therefore, it is the conclusion of this office that the minimum qualifications to qualify as the superintendent of a

Honorable L. Edward Stone, Jr.

six-director school district in a first-class county not having a charter form of government, as set forth in Section 168.191, RSMo 1969, are constitutional.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

TAXATION (INCOME):  
CONSTITUTIONAL LAW:

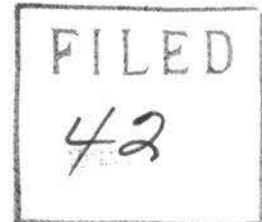
A taxpayer who has a fiscal period  
which includes any part of 1972  
and a part of 1973 may determine

his tax and taxable income pursuant to the provisions of Sections  
143.011 to 143.996, Senate Bill No. 549, Second Regular Session,  
76th General Assembly, if he files an election to that effect with  
the Director of Revenue as provided in Section B of such Senate  
Bill.

OPINION NO. 42

January 29, 1973

Mr. James R. Spradling  
Director of Revenue  
Department of Revenue  
Jefferson State Office Building  
Jefferson City, Missouri 65101



Dear Mr. Spradling:

This opinion is in answer to the opinion request of your predecessor which asks whether the provisions of Section B of Senate Bill No. 549, Second Regular Session, 76th General Assembly is applicable to income received prior to August 13, 1972, which was ninety days after the adjournment of such session and if so, whether these provisions are constitutional. Section B provides as follows:

"This act shall become effective on January 1, 1973; but it shall apply only with respect to taxable periods beginning on or after January 1, 1973. The repeal of the provisions of Chapter 143, RSMo., shall become effective January 1, 1973, but it shall not affect any taxable periods beginning before January 1, 1973, in any respect, including, but not limited to, the determination of tax, interest, penalties, procedures, and periods of limitations. Notwithstanding the first and second sentences of this section, section 143.471, relating to electing small business corporations, shall apply to such corporations and their shareholders with regard to taxable periods of such corporations ending on or after January 1, 1973. The preceding sentence shall not apply with regard to taxable periods of electing small business corporations beginning before January 1, 1973,

Mr. James R. Spradling

if such corporation and all of its shareholders elect to that effect with the director of revenue on or before January 1, 1973. Notwithstanding the first four sentences of this section, a taxpayer who has a fiscal period which includes parts of each of the years 1972 and 1973 may determine his tax and taxable income pursuant to the provisions of this act if he files an election to that effect with the director of revenue on or before the due date (including extensions of time) of his return for the taxable period."

The clear, plain and unequivocal provisions of the last sentence of Section B provide that Senate Bill No. 549 is applicable to a taxpayer whose fiscal period includes any part of the year 1972 and part of the year 1973 and such taxpayer may determine his tax and taxable income pursuant to the provisions of Senate Bill No. 549 if he files an election to that effect as provided in such sentence.

It is a well settled principle of constitutional construction that only where there is a clear conflict between a legislative enactment and the Constitution are the courts warranted in declaring the law to void. In the matter of Burris, 66 Mo. 442, 450 (1877).

An act of the legislature has the presumption of constitutionality and courts shall not declare an act unconstitutional unless it plainly contravenes the Constitution. Borden Company v. Thomason, 353 S.W.2d 735 (Mo. banc 1962).

We find no clear violation of the Constitution by the enactment of the last sentence of Section B of Senate Bill No. 549 and it is, therefore, our view that a taxpayer whose fiscal period includes any part of 1972 and part of 1973 may file his income tax return based on the provisions of Senate Bill No. 549.

#### CONCLUSION

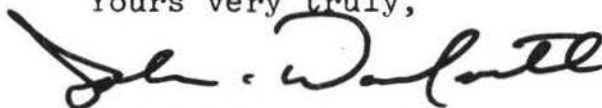
It is the opinion of this office that a taxpayer who has a fiscal period which includes any part of 1972 and a part of 1973 may determine his tax and taxable income pursuant to the provisions of Sections 143.011 to 143.996, Senate Bill No. 549, Second Regular Session, 76th General Assembly, if he files an election to that effect with the Director of Revenue as provided in Section B of such Senate Bill.



Mr. James R. Spradling

The foregoing opinion, which I hereby approve, was prepared by my assistant, C. B. Burns, Jr.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH  
Attorney General

SCHOOLS: A board of education may not require  
TEACHERS: a teacher to have been employed two  
RULES & REGULATIONS: years or more by another school district within ten years immediately prior to employment by the board of education as a condition for a waiver of one year toward tenure of a probationary period for a probationary teacher.

OPINION NO. 43

November 15, 1973

Honorable Donald L. Manford  
Missouri Senate, 8th District  
9409 Oakland  
Kansas City, Missouri 64138



Dear Senator Manford:

You have requested an opinion of the Attorney General whether:

"A rule or regulation by a board of education be considered reasonable if it required that experience in another school district must be within ten years immediately prior to employment to enable the board of education to waive one year toward tenure of a probationary period for a probationary teacher?"

Section 168.104(5), RSMo 1969, (Teacher Tenure Act) provides:

"'Probationary teacher', any teacher as herein defined who has been employed full time in the same school district for five successive years or less. A teacher recognized as a full-time teacher by a public school retirement system shall be recognized as a full-time teacher under sections 168.102 to 168.130. In the case of any probationary teacher who has been employed in any other school system as a full-time teacher for two or more years, the board of education shall waive one year of his probationary period;"  
(Emphasis added)

This section of the Teacher Tenure Act has previously been construed in an opinion of the Attorney General (Opinion No. 233, Holliday, 10-24-72 (copy enclosed)). In that opinion this office

Honorable Donald L. Manford

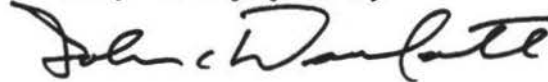
determined that "the board of education, under Section 168.104(5), RSMo 1969, must waive one year of a teacher's probationary period if he has been employed in any other school system as a full-time teacher for two or more years." We reaffirm our position set forth in that opinion. The statutory language is mandatory and the power of the board of education to make such a rule must be found prior to a determination of the reasonableness of the rule. We find no such power. Accordingly, Section 168.045(5), RSMo, does not permit a school district to impose a more stringent rule or regulation upon a teacher in the determination of his eligibility for classification as a permanent teacher. See Wright v. Board of Education of St. Louis, 246 S.W. 43 (Mo. 1922).

#### CONCLUSION

It is the opinion of this office that a board of education may not require a teacher to have been employed two years or more by another school district within ten years immediately prior to employment by the board of education as a condition for a waiver of one year toward tenure of a probationary period for a probationary teacher.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donald R. Bird.

Very truly yours,



JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 233  
10-24-72, Holliday



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

December 13, 1973

OPINION LETTER NO. 44

Honorable C. E. Hamilton, Jr.  
Prosecuting Attorney  
Callaway County Courthouse  
Fulton, Missouri 65251

Dear Mr. Hamilton:

This is in response to your request for an opinion from this office in part as follows:

"Under the Missouri Statutes, and specifically Section 445.030 Revised Statutes of Missouri, 1969, what requirements have to be met before a County Recorder of Deeds should accept a plat on land outside the incorporated limits of the City for recording? Specifically, should the map or plat, as presented to the County Recorder of Deeds, not only contain an acknowledgement by a registered land surveyor and his seal, as provided in Section 327.391 Revised Statutes of Missouri, 1969, but also a certificate properly acknowledged, by the proprietor or owner of the property, and also a certificate that all taxes on the property have been paid?

"The Callaway County Recorder of Deeds has informed me that, in the past, he has believed that he should not accept any plat for recording in the County Plat Book unless the plat was accompanied by an owner's certificate and a certificate that all taxes have been paid on the property. I have attached to this request a copy of a plat, along with the normal owner's certificate and tax certification, as Exhibit A. The County Recorder of Deeds has required

Honorable C. E. Hamilton, Jr.

the accompanying documents regardless of whether the plat to be recorded was of land inside or outside the incorporated limits of any town or city. An individual who has now subdivided land, has come to the County Recorder of Deeds with simply a plat and survey signed by a registered land surveyor and bearing his seal. The subdivider does not have the owner's certificate attached, and he does not have a certificate that all taxes on the property have been paid. The County Recorder of Deeds has refused to record the instrument until the owner's certificate and the certificate that all taxes have been paid is attached."

You refer to Section 445.030, RSMo. This section is part of Chapter 445, RSMo, concerning the preparation of maps or plats of real estate and the filing thereof in the recorder's office.

Section 445.010, RSMo, provides in part:

"1. Whenever any city, town or village, or any addition to any city, town or village, shall be laid out, the proprietor of such city, town or village, or addition, shall cause to be made out an accurate map or plat thereof, particularly setting forth and describing:

(1) All parcels of ground within such town, village or addition reserved for public purposes by their boundaries, course and extent, whether they be intended for avenues, streets, lanes, alleys, commons or other public uses; and

(2) All lots for sale, by numbers, and their precise length and width."

Section 445.030, RSMo, to which you refer, provides as follows:

"Such map or plat shall be acknowledged by the proprietor before some official authorized by law to take acknowledgments of conveyances of real estate, and recorded in the office of the recorder of deeds of the county in which the land platted is situated; provided, however, that if such map or plat be of land situated within the corporate limits of any incorporated city, town or village, it shall

Honorable C. E. Hamilton, Jr.

not be placed of record until it shall have been submitted to and approved by the common council of such city, town or village, by ordinance, duly passed and approved by the mayor, and such approval endorsed upon such map or plat under the hand of the clerk and the seal of such city, town, or village; nor until all taxes against the same shall have been paid; and before approving such plat, the common council may, in its discretion, require such changes or alterations thereon as may be found necessary to make such map or plat conform to any zoning or street development plan which may have been adopted or appear desirable; and to the requirements of the duly enacted ordinances of such city, town or village, appertaining to the laying out and platting of subdivisions of land within their corporate limits."


We understand that the facts under consideration concern a plat of land not within the limits of any incorporated or unincorporated city, town, or village and does not constitute an addition thereto and does not purport to establish a city, town or village, and your question is whether the recorder of deeds has authority under Section 445.030, supra, to refuse to file the plat of record without its being acknowledged by the proprietor and a certificate of the proprietor filed showing that all taxes have been paid.

We assume for the purpose of this opinion that all other legal requirements concerning the preparation of the plat have been complied with.

It is our opinion that Section 445.030, RSMo, does not apply to maps or plats of real estate outside the limits of any city, town, or village or any addition thereto. Weakley v. State Highway Commission, 364 S.W.2d 608 (Mo. 1963).

It is our view that a county recorder of deeds has no authority under Section 445.030, RSMo, to refuse to file or record a plat of real estate outside the limits of a city, town, or village or addition thereto and which plat does not purport to establish an unincorporated city, town or village even though such plat is not certified and properly acknowledged by the proprietor or owner of the property and even though no certificate is filed stating that all taxes on the property have been paid.

Yours very truly,

  
JOHN C. DANFORTH  
Attorney General

February 7, 1973

OPINION LETTER NO. 47  
(Answer by Letter-Gene E. Voigts)

Honorable Christopher S. Bond  
Governor of Missouri  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Governor Bond:

On November 22, 1972, John C. Vaughn, the State Comptroller, requested an official opinion of the Attorney General as to the inquiries hereinafter set forth. Because the functions of State Comptroller have succeeded to the Office of Administration, and the Comptroller's duties to the Commissioner of Administration, and, since in the absence of a Commissioner of Administration, the Governor shall take charge of such office and superintend the business thereof, we are therefore directing this opinion letter to you.

Mr. Vaughn requested an official opinion of the Attorney General as to the following questions:

"(A) May a judge or commissioner of the State of Missouri who has twelve years of continuous service and who has reached the voluntary retirement age of 65 years and voluntarily retires receive an increased retirement pay based on the statutory salary of \$30,000 as authorized by Act #105, 2nd Regular Session 1972, pending a determination of an apparent violation by the State of Missouri of the general wage and salary standards promulgated under the Economic Stabilization Act of 1970 (P-L 91-379, as amended by P-L 92-10)?



Honorable Christopher S. Bond

"(B) Assuming such judge or commissioner is within and bound by the general wage and salary standards, would the statutory salary increase authorized by Act #105 in excess of standards be suspended until the full rate of salary is authorized by the Act, or would the Act (sic) be a nullity so that no statutory increase would be authorized?

\* \* \*

"(C) May such retired judge and his surviving beneficiary receive increased retirement benefits at the increased statutory rate, as authorized by Act #105, at a time when there is no longer any violation, if any, of the general wage and salary standards, notwithstanding section 476.530 which provides that the 'retirement compensation [of a judge] shall be equal to fifty percent of the compensation provided by law at the time of retirement' and section 476.535 which provides that his beneficiary shall receive benefits in the amount 'equal to fifty percent of the amount of the retirement compensation' of the judge?"

Senate Bill No. 132, Seventy-Sixth General Assembly, First Regular Session, relating to retirement and retirement benefits of certain judicial personnel was approved on July 13, 1971. Section 4 of that Bill, which became Section 476.530, Cum.Supp. RSMo 1971, provides:

"The retirement compensation shall be equal to fifty percent of the compensation provided by law at the time of retirement for the judges of the highest court on which the retired judge served as a full-time judge. Retirement compensation shall be paid to the retired judge monthly during the remainder of his life."

Because of the asserted application of the Economic Stabilization Act to the State of Missouri and the compensation of its judicial officers through litigation initiated by the United States of America as Plaintiff against the State of Missouri and

Honorable Christopher S. Bond

William Robinson, Treasurer of the State of Missouri, Defendants, in the United States District Court for the Western District of Missouri, Central Division, Case No. 1888, questions have arisen as to what effect, if any, the Economic Stabilization Act has upon the determination of retirement benefits of judicial personnel as set forth in Section 476.530, Cum.Supp. RSMo 1971.

Two events have rendered the request for an official opinion of the Attorney General moot. The first was the issuance of Executive Order 11695, on January 11, 1973, which terminated Phase II of the Economic Stabilization Program and implemented Phase III. The second is that on January 29, 1973, this office received Plaintiff's Application for Leave of the Court to Withdraw Plaintiff's Motion for Preliminary Injunctive Relief. In that motion, plaintiff stated:

"Comes now the Plaintiff and moves that its motion for a preliminary injunction be withdrawn from the consideration of this Honorable Court.

"The President promulgated Executive Order 11695 on January 11, 1973. The Executive Order and regulations issued thereunder removed the need for prospective injunctive relief against the increased salary payments by Defendant State of Missouri.

"The Executive Order does not defeat any suit or action commenced with respect to any right possessed, liability incurred or offense committed prior to January 11, 1973. Plaintiff, therefore, renews its motion for mandatory injunctive relief for restitution of salary increases paid and received which were in excess of those permitted by the Economic Stabilization Act of 1970 and regulations issued thereunder."

Therefore, because the United States government is no longer asserting a claim that the present compensation of the judicial officers of the State of Missouri is in violation of the Economic Stabilization Program, the questions presented are moot. Thus, a judge who elects to retire receives retirement compensation which is equal to fifty percent of the compensation provided by law at

Honorable Christopher S. Bond

the time of retirement for the judges of the highest court on which the retired judge served as a full-time judge. The phrase "compensation provided by law at the time of retirement," refers to those specific amounts as provided by the General Assembly of Missouri as set forth in the various statutory provisions defining the rate of judicial compensation, and, such amounts are presently unaffected by Phase III of the Economic Stabilization Program.

Very truly yours,

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

June 26, 1973

JOHN C. DANFORTH  
ATTORNEY GENERAL

OPINION LETTER NO. 48

Major General Charles M. Kiefner  
Adjutant General  
1717 Industrial Drive  
Jefferson City, Missouri 65101

Dear General Kiefner:

This is in response to a request of your predecessor for an opinion from this office in part as follows:

"May the cost of life insurance for individual Guardsmen, ordered to active State duty pursuant to Section 41.480 RSMO, for coverage only during such duty, be considered 'an expense incident to emergency duties performed by the National Guard when ordered out by the Governor' and therefore chargeable to the appropriation authorized the Governor by Section 4.020 of the Conference Committee Substitute for House Bill #1004, 76th General Assembly.

"If not, is the cost properly chargeable to an existent State appropriation or is new legislation required?"

The military forces of this state is governed by Chapter 41, RSMo. It provides for the organization and government of the state militia and National Guard.

We assume life insurance to which you refer means life insurance on the life of the individual member of the state militia which is payable to his beneficiary or for the benefit of his estate. We find no statute authorizing the purchase of life insurance as suggested.

Major General Charles M. Kiefner

The militia of the state, which includes the Adjutant General and his office, constitutes the military of the executive department of the state government, under the direct control of the Governor. The organized militia consists of the National Guard and air forces of the United States that are allocated to the state and accepted by the state and members of the state militia organized by the state.

Section 41.430, RSMo, provides that the officers, warrant and flight officers of the organized militia on active duty in the service of the state shall receive as compensation the same pay, longevity and allowances as are or may be provided for officers of like grade and branch of service in the armed forces of the United States. It also provides that enlisted personnel of the organized militia when ordered to active duty by the Governor shall receive as compensation the same pay, longevity, rations and quarters as may be provided for enlisted personnel of like grades and branches of service in the armed forces of the United States, or \$14 a day, whichever is greater. (This amount has been increased to \$19 a day by House Bill No. 499, 77th General Assembly, approved by the Governor on June 15, 1973.) In other words, their compensation as such is provided for by statute.

The organized military forces as provided for in Chapter 41, RSMo, is an administrative agency of the state and has only such powers as are expressly given by statute. State ex rel. Kelly v. Hackmann, 205 S.W. 161, 164-165 (Mo. banc 1918).

It is our opinion that since the compensation to be paid members of the military forces of the state is determined by statute the amount as provided for by statute is the maximum and no additional compensation can be paid. We have held absent such a statute when the amount of compensation to be paid a public employee for services rendered is not determined by statute but is within the discretion of the employing agency, insurance may be purchased as part of the compensation to be paid the employee by agreement. However, this rule does not apply to the question now under consideration due to the fact that the amount of compensation is determined by statute.

It is the opinion of this office that public funds may not be used to pay the premiums for life insurance on the life of members of the state militia while serving on active duty during an emergency.

Yours very truly,



JOHN C. DANFORTH  
Attorney General



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

March 15, 1973

OPINION LETTER NO. 49

Mr. Charles Shaffer, Director  
Division of Management Systems  
Office of Administration  
State Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. Shaffer:

This letter is in reply to an official request for an Attorney General's opinion submitted by the past director of the Administrative Services section of the Division of Budget and Comptroller, Mr. Richard Murphy. Mr. Murphy inquired whether equipment used pursuant to a lease-purchase agreement by one executive agency of the state of Missouri could be transferred to another executive agency of the state of Missouri without said transfer being in conflict with some provision of state law, and, especially, the competitive bid requirements of Section 34.040, RSMo. Specifically, the question was whether the Division of Mental Diseases [Mental Health] could legally transfer an IBM 360/30 computer, which was the subject of a lease-purchase agreement between that executive agency and International Business Machines Corporation, to the Division of Health, another executive agency of the state of Missouri.

We have concluded that such a transfer is expressly authorized by the provisions of Section 34.140, RSMo, which provides in part as follows:

"The purchasing agent shall have the power to transfer supplies from any department where they are not needed to any other department where they are needed and to direct that proper charges and credits be made on the inventories of the departments concerned. . . ."

Mr. Charles Shaffer

The term "supplies" is defined "to mean supplies, materials, equipment, contractual services and any and all articles or things, except as in this chapter otherwise provided." Section 34.010, RSMo. This broad definition of "supplies" would include the IBM 360/30 computer which is the subject of the present inquiry.

In order to perfect the transfer of equipment, which was the subject of the original opinion request, it would only be necessary that the purchasing agent "direct that proper charges and credits be made on the inventories of the departments concerned." (You will please note that by operation of Section 26.300(3), RSMo Supp. 1971, Section 34.140, RSMo, when referring to the purchasing agent, shall be construed as referring to the Commissioner of Administration.)

Therefore, you are hereby advised that it is not contrary to any provision of state law for the Commissioner of Administration, acting in the role of purchasing agent, to transfer computer equipment from the Division of Mental Health to the Division of Health.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General





JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

February 23, 1973

OPINION LETTER NO. 51

Honorable Gene McNary  
Prosecuting Attorney  
St. Louis County  
St. Louis County Courts Building  
7900 Carondelet  
Clayton, Missouri 63105

Dear Mr. McNary:

This is in response to your request for an opinion from this office as follows:

"May a defendant, who strikes a police officer in the official discharge of that officer's duty, be charged with the violation of either the misdemeanor provisions of 557.220 R.S.Mo. or with the violation of the felony provisions of 557.215 R.S.Mo.? Further, if a defendant is charged with violation of the felony provision of 557.215 R.S.Mo. are the misdemeanor provisions of 557.220 R.S.Mo. 'a lesser-included offense' requiring a lesser-included offense instruction at trial?"

"Assume a factual situation as follows: Police officer while on duty within his jurisdiction receives call from dispatcher to respond to a certain location for a fight in progress. Upon arriving at the scene, police officer attempts to arrest one of the persons involved in the melee and one of the by-standers in the crowd jumps upon the back of the police officer, strikes the police officer with his fist about the head and shoulders, and also attempts to

Honorable Gene McNary

wrestle the police officer's gun from his position. Which statute would more appropriately apply in this situation considering no serious injury done to the officer--557.215 R.S.Mo., a felony, or 557.220 R.S.Mo., a misdemeanor?"

You inquire specifically concerning the provisions of Sections 557.215 and 557.220, RSMo, and their application to the offense which you describe. In order to construe these sections, it is necessary to consider their legislative history together with other statutory provisions.

Section 557.200, RSMo, provides in substance that if any person or persons knowingly and willfully obstruct, resist or oppose any sheriff or other ministerial officer in the service or execution of any writ, warrant or process, or in the discharge of any official duty, in any felony case, such person shall be punished by imprisonment in the penitentiary for a period as provided therein.

Section 557.210, RSMo, provides in substance that if any person or persons shall knowingly and willfully obstruct, resist or oppose any sheriff or any other ministerial officer in the service or execution of any writ, warrant or process or in the discharge of any other duty in any case, civil or criminal, other than a felony, such person shall be adjudged guilty of a misdemeanor.

Section 557.220, RSMo, provides as follows:

"Every person who shall knowingly and willfully assault, beat or wound any such officer, while engaged in the service or execution, or attempt to serve or execute any writ, warrant or process, original or judicial, or any order or rule of court, or while in the discharge of any other official duty, shall, on conviction, be adjudged guilty of a misdemeanor."  
(Emphasis added)

These statutory provisions have been the same in substance since 1879.

It is our view "such officer" in Section 557.220, supra, means the sheriff or ministerial officer as described in Sections 557.200 and 557.210.

It is our view that these sections should be construed together in determining the provisions of Section 557.220. The offenses described in these sections apply only to an assault on a sheriff or other ministerial officer.

Honorable Gene McNary

Section 557.215, RSMo, was enacted by the General Assembly in 1965, H.C.S.S.B. No. 190, Laws of Missouri 1965, pages 668-669 which reads as follows:

"Any person who shall wilfully strike, beat or wound any police officer, sheriff, highway patrol officer or other peace officer while such officer is actively engaged in the performance of duties imposed on him by law, and every person who shall aid or assist in doing any such striking, beating or wounding, is guilty of a crime and, upon conviction, shall be punished by imprisonment by the department of corrections for a term of not more than five years, or by confinement in the county jail for not less than six months nor more than one year, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment."

This statute was not enacted as an amendment to any other statute and in our opinion was intended to create a new offense by making it a felony for any person to willfully strike, beat or wound any police officer, sheriff, highway patrol officer or any peace officer while actively engaged in the performance of their official duties, and making it an offense for any person who shall aid or assist in such striking, beating or wounding of such officers.

No doubt Section 557.215 was numbered and placed in sequence with the above sections by the committee on legislative research as authorized by Section 3.050, RSMo, but such designation had no legislative authority to expand or change the meaning of the law by their arbitrary insertion in the Revised Statutes between Sections 557.210 and 557.220. State v. Maurer, 164 S.W. 551 (Mo. 1914). It should be construed as though it created a separate and distinct offense without regard to the provisions of the other statutory provisions above referred to.

Section 556.230, RSMo, provides as follows:

"Upon an indictment for an assault with intent to commit a felony, or for a felonious assault, the defendant may be convicted of a less offense; and in all other cases, whether prosecuted by indictment or information, the jury or court trying the case may find the defendant not guilty of the offense as charged, and find him guilty of any offense, the commission of which is necessarily included in that charged against him."

Honorable Gene McNary

Under Section 557.215, supra, any person who shall willfully strike, beat or wound any police officer, sheriff, highway patrol officer, or other peace officers while such person is actively engaged in the performance of their duties or who aid such person in striking, beating or wounding is guilty of the crime punishable by imprisonment in the penitentiary or by confinement in the county jail as provided therein. It constitutes a felony and is a felonious assault within the provisions of Section 556.230, supra.

The question now arises under the facts as you have submitted whether such person may be charged with a felony as provided in Section 557.215, supra, or with a lesser offense.

It is our opinion that it is a discretionary matter with the prosecuting attorney to determine whether a person is to be charged under the provisions of Section 557.215, or with a lesser offense which the facts and evidence will support. It is often true a single act will constitute an offense under two different statutes. Under such circumstances the state may elect to prosecute for either offense. State v. Smith, 422 S.W.2d 50 (Mo. banc 1967); State v. Koen, 468 S.W.2d 625 (Mo. 1971).

Section 559.220, RSMo, provides as follows:

"Any person who shall assault or beat or wound another, under such circumstances as not to constitute any other offense herein defined, shall, upon conviction, be punished by a fine not exceeding one hundred dollars, or imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

The factual situation which you have submitted is that a police officer while on duty receives a call from the dispatcher to respond to a certain location for a fight in progress and upon arriving at the scene the police officer attempts to arrest one of the persons involved in the melee one of the bystanders in the crowd jumps upon the back of the police officer, strikes the police officer with his fist about the head and shoulders, and also attempts to wrestle the police officer's gun from his position.

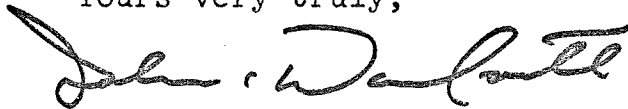
It is our view that under these assumed facts the bystander who jumped upon the back of the police officer and striking such police officer with his fists may be charged under the provisions of Section 557.215, supra, a felony statute, or under Section 559.220, supra, a misdemeanor statute.

Honorable Gene McNary

If he is charged under the felony statute, the court should instruct the jury that the defendant may be convicted of the offense of common assault.

It is therefore our opinion that it is a discretionary matter for the prosecuting attorney to decide whether a person should be charged with a greater or lesser offense depending upon the facts of each case. A person charged under the provisions of Section 557.215 with felonious assault on a police officer may be convicted of the lesser offense of common assault under the assumed facts as submitted.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH  
Attorney General

COURTS:  
PROBATE COURTS:  
RETIREMENT:

Commissioners of the probate courts appointed under the provisions of Section 481.115, RSMo, applicable to probate courts of counties having more than 400,000 inhabitants are not entitled to receive any compensation under Sections 476.450, RSMo et seq., which provide for the appointment of retired judges and commissioners as special commissioners or referees.

OPINION NO. 53

March 1, 1973

Honorable Donald L. Manford  
Missouri Senate, District 8  
Room 425 State Capitol Building  
Jefferson City, Missouri 65101



Dear Senator Manford:

This opinion is in response to your question with respect to Sections 476.450 to 476.510, RSMo, which deal with the appointment of retired judges as special commissioners.

Your questions are as follows:

"Is a Commissioner of the Probate Court, appointed pursuant to Section 481.115, RSMo., 1969, who has served twelve (12) years continuously in that capacity and who has attained the age of sixty-five years, entitled to receive the benefits provided by Section 476.450, *ibid.*, by reason of Section 476.456, *ibid.*?"

"If the answer to the preceding question is in the affirmative, is the individual required to do any affirmative act prior to the date he becomes fully qualified under said sections?"

"If the answer to the first question is in the affirmative, is his retirement compensation based upon one-third of his annual compensation earned during the year immediately preceding the date he attains the age of sixty-five? If not, then on what basis is his retirement compensation calculated?"

Honorable Donald L. Manford

Section 481.115, RSMo, to which you refer, provides:

"The judge of the probate court of any county, which has more than four hundred thousand inhabitants, may appoint, as one of the assistants authorized by section 483.585, RSMo, a person to be known as probate court commissioner, who shall possess the same qualifications and take and subscribe a like oath as such judge. The compensation of the commissioner shall be limited, determined and paid as provided by sections 483.475 and 483.585, RSMo; provided, however, that said commissioner shall receive a per diem of twenty dollars per day as compensation unless said commissioner is a regular salaried employee of the probate court in which event he shall receive no per diem allowance; and his service shall extend until terminated by order of the judge entered of record but not beyond the term of office of such judge. Subject to approval or rejection by the judge, the commissioner shall have all the powers and duties of the judge; but the judge shall by order of record reject or confirm all orders, judgments, and decrees of the commissioner within the time such judge could set aside such orders, judgments, or decrees, had the same been made by him; and if so confirmed such orders, judgments, and decrees shall have the same effect as if made by the judge on the date of such confirmation."

Under the provisions of the above section such probate commissioners are paid as determined by Sections 483.475 and 483.585, RSMo.

Section 483.475 (Senate Bill No. 423, 76th General Assembly, Second Regular Session), provides:

"1. In counties having more than thirty thousand inhabitants, the probate judges shall appoint their own clerks, assistants and stenographers, and shall determine their number and their salaries by order of record and may remove them when in the discretion of the judges it is deemed advisable. All salaries of the judges and their appointees shall be paid monthly by the county, upon requisition issued by the probate judges.



"2. In counties having more than thirty thousand and less than two hundred and fifty thousand inhabitants, the total salaries of all clerks, assistants and stenographers in the probate court for any one calendar year shall not exceed the total sum of fees received and accounted for by the judge of the court for the preceding year, except that in no event shall the total sum exceed thirty thousand dollars except as provided hereinafter in paragraph 3, and except that in counties where the total sum of fees received and accounted for by the judge for the preceding year shall be less than four thousand two hundred dollars, the total salaries of all clerks, assistants and stenographers shall not exceed the sum of four thousand two hundred dollars.

"3. In counties having more than one hundred and fifty thousand and less than two hundred fifty thousand inhabitants, and in counties of the second class in which the circuit court sits in more than one city, the total salaries of clerks, assistants and stenographers in the probate court for any one calendar year shall not exceed the total sum of thirty-five thousand dollars.

"4. In any county where need exists, the county court is authorized to provide such additional clerks, deputy clerks or other employees in the probate court as the county court in its discretion believes are required and is authorized to provide funds for payment of salaries or parts of salaries of the clerks, deputy clerks and employees in addition to the maximum amounts allowed by subsection 2.

"5. In any county having two hundred and fifty thousand or more inhabitants, the total salaries of all clerks, assistants and stenographers for any calendar year shall not be such that the total salaries of the judge and his appointees shall exceed the total sum of fees received and accounted for by the judge for the year."

Section 483.585, provides:

"In all counties now or hereafter having a population of two hundred and fifty thousand

Honorable Donald L. Manford

inhabitants or more, and in cities not within a county, the probate judge shall, at the end of each month, pay to the county treasurer, or in a city not within a county, to the city treasurer, all fees charged and collected on behalf of the judge or clerks of said court, and said treasurer shall receipt therefor. The probate judge shall fix the salaries of his clerks, assistants and stenographers, and out of the fees paid over to the treasurer shall be paid the salary of the probate judge, the salaries of his clerks, assistants and stenographers, and all expenses incurred by him for supplies and office equipment used in the office, upon requisition drawn by the judge of said court on said county or city treasurer. The total of all salaries, judge's salary and expenses so paid out during any calendar year shall not exceed the total fees collected by such judge during such year."

The two applicable sections with respect to such judges' retirement provisions are Sections 476.450 and 476.456, RSMo.

Section 476.450, provides:

"Any person having reached the age of sixty-five years and having in this state served an aggregate of twelve years, continuously or otherwise, as a judge or commissioner of the supreme court, or as a judge or commissioner of any of the courts of appeals, or as a circuit judge, or as a judge of a court of criminal correction, or as a judge of a court of common pleas, or either or both as judge or commissioner of any of said courts, and who shall have ceased to hold such office by reason of the expiration of his term, or voluntary resignation or retirement by reason of having reached the age of seventy-five years, under section 25, article V, of the Constitution of Missouri, shall, if he so elects as hereinafter provided, be made, constituted and appointed a special commissioner or referee for and during the remainder of his life and shall, while he remains a resident of Missouri, be entitled to and shall receive an annual compensation, salary or

Honorable Donald L. Manford

retirement compensation during the remainder of his life a sum equal in amount to one-third the salary or compensation then or thereafter provided for by law for the office from which he has retired, and said sum shall be payable monthly out of the general revenue of the state of Missouri." (Emphasis added)

Section 476.456, provides:

"1. Any person whether or not a licensed attorney having reached the age of sixty-five years, and having any prior judicial service except as a police judge, or justice of the peace of twelve years or more on October 13, 1969, or having served an aggregate of twelve years continuously or otherwise as judge or commissioner of any of the courts provided for under the provisions of sections 16 and 18, article V of the constitution, shall have the same rights and privileges upon the same conditions as are provided for the judges and commissioners specified in section 476.450.

"2. Any judge presently serving as a magistrate or probate judge is entitled to include any time he has served as a justice of the peace of this state in computing the prior judicial service required by this section."

First of all, it is clear that Section 476.456 refers to judges or commissioners "of any of the courts provided for under the provisions of sections 16 and 18, article V of the constitution, . . ." Section 16 of Article V refers to the probate courts and Section 18 of Article V refers to the magistrate courts.

However, as can be seen from our above quotation of Section 476.450, the eligible judge or commissioner is to receive "as annual compensation, salary or retirement compensation during the remainder of his life a sum equal in amount to one-third the salary or compensation then or thereafter provided for by law for the office from which he has retired . . . ." Further, as we have noted by our quotations of the provisions of Sections 481.115, 483.475 and 483.585, the salaries of the commissioners of such probate courts are not set by law but are determined by the judges of the court as provided therein.

While it is true, of course, that a determination of salary by a judge under such provisions may have the force of law, it

Honorable Donald L. Manford

is not a determination by the legislature and is not "provided for by law for the office . . . ." In this regard, we note that Section 21 of Article III of the Missouri Constitution provides that no law shall be passed except by bill (although the initiative power is reserved to the people under Section 49, Article III). While there are some cases holding that "prescribed by law" does not have the limited connotation of "prescribed by statute", we do not believe that such cases are applicable in the premises. Cf. In re McKinney's Estate, 173 S.W.2d 898, 902 (Mo. 1943) and United States Fidelity & Guaranty Co. v. Guenther, 281 U.S. 34, 50 S.Ct. 165, 74 L.Ed. 683 (1929).

We realize that there is no ambiguity in Section 476.456, quoted above, which expressly provides that qualified commissioners as well as judges of ". . . any of the courts provided for under the provisions of sections 16 and 18, article V of the constitution, shall have the same rights and privileges upon the same conditions as are provided for the judges and commissioners specified in section 476.450." There are, of course, no commissioners of the magistrate courts (Section 18, Article V) and the reference to commissioners must necessarily have been to commissioners of the probate court, (Section 16, Article V). All other judges have salaries fixed by law and commissioners of the courts of appeals and of the Supreme Court have salaries which are by law, Section 477.081, RSMo Supp. 1971, the same as that of the judges appointing them. The problem then hinges not on interpreting the legislative intent as such intent is clearly expressed in Section 476.450. The problem is one of giving effect to the legislative intent. Absurdities are not attributed to legislatures unless there is no rational means of escape. State v. Board of Curators, 188 S.W. 128, 135 (1916).

As we have noted the salaries of the commissioners of the probate court are fixed by the judges and theoretically at least have no determinable certainty or uniformity. This creates an illogical and unworkable situation if an attempt is made to compute present or future benefits of such commissioners under the provisions of Section 476.450. In practical application it would place the determination of retirement benefits in the hands of the judge who sets the commissioner's salary and subsequent computations would vary depending upon the amount paid a successor commissioner. We do not believe that the legislature intended such a result.

In these circumstances it should be considered probable that the legislature in providing that the retirement amount would be as then or thereafter provided by law meant exactly that. That is, that the legislature intended that such commissioners would be entitled to retirement benefits at such time as the amount of the compensation of such commissioners is provided for by law.

Honorable Donald L. Manford

Since no such compensation has been provided by law, the legislature has not, in our view, implemented the provisions of Section 476.456 and thus there is no quantitative measure with which to ascertain compensation entitlement.

We note by comparison that Section 476.515, RSMo Supp. 1971, of the new retirement sections defines "Judge" as:

" . . . any person who has served or is serving as a judge or commissioner of the supreme court or of the court of appeals, or as a judge of any circuit court, probate court, magistrate court, court of common pleas or court of criminal corrections of this state or as a justice of the peace;"

Inasmuch as the above definition obviously excludes such commissioners of the probate courts, it seems clear that the legislature abandoned any desire to bring such probate commissioners under a retirement plan. Considering both plans together we see no logical reason why the legislature would include them in one plan and exclude them from the other. Notably, the new retirement plan by its definition of judges does not even include time spent in service as a probate court commissioner in determining length of service.

We believe that the above answers the remaining questions you pose.

#### CONCLUSION

It is the opinion of this office that commissioners of the probate courts appointed under the provisions of Section 481.115, RSMo, applicable to probate courts of counties having more than 400,000 inhabitants are not entitled to receive any compensation under Sections 476.450, RSMo et seq., which provide for the appointment of retired judges and commissioners as special commissioners or referees.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN C. DANFORTH  
Attorney General



January 5, 1973

OPINION LETTER NO. 54  
Answer by Letter - Klaffenbach



Honorable John Sims  
Prosecuting Attorney  
Newton County Courthouse  
Neosho, Missouri 64850

Dear Mr. Sims:

This letter is in response to your opinion request in which you ask the following questions:

- "a) Is it the duty of a Prosecuting Attorney of a county of the third class to represent and act as attorney for a County Highway Commission (Alternative Form) organized under the provisions of RSMO 230.200 et seq.?
- "b) Does the County Highway Commission have the authority to hire an attorney to represent it?
- "c) Is it permissible for a Prosecuting Attorney to act as attorney for a County Highway Commission and to receive compensation for his services from the Commission in addition to his compensation as Prosecuting Attorney?"

It is our view that the enclosed opinions relating to the duties of the prosecuting attorney with respect to county hospitals and county planning and zoning commissions apply and present an analogous situation. That is, although Sections 230.200, RSMo Supp. 1971 et seq., make no mention of the employment of legal counsel or impose any express requirement upon the prosecuting

Honorable John Sims

attorney to represent the county highway commission established pursuant to such sections it nevertheless seems clear to us that under the provisions of Chapter 56, RSMo relative to the duties of the prosecuting attorney, the prosecuting attorney must represent the county highway commission. In our view the alternative form, county highway commission provisions merely establish another way in which certain third and fourth class counties can function in maintaining county roads.

You have cited to us the case of State ex rel. Wammack & Welborn v. Affolder, 257 S.W. 493 (Spr.Ct.App. 1924), in which the court held that a prosecuting attorney has no duty to represent a township in connection with a road bond issue. This case is not applicable because the county highway commission is a county agency performing a county function.

Thus in answer to your first question, it is our view that it is the duty of the prosecuting attorney of a county of a third class to represent and act as attorney for a county highway commission, alternative form, organized under the provisions of Sections 230.200, RSMo Supp. 1971 et seq.

It follows in view of our first holding and consistent with the enclosed opinions that the county highway commission does not have the authority to hire a private attorney to represent it.

It likewise follows that since the prosecuting attorney, in our view, must act for the highway commission as part of his official duties he cannot receive additional compensation because such additional compensation has not been expressly provided by the legislature for the performance of such duties.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 68  
10/7/39, Orr

Op. No. 92  
3/5/53, Vogel

Op. No. 1  
6/24/64, Conley

Op. No. 131  
6/26/64, Hollingsworth



JURY:  
DEPOSITS:  
COURT COSTS:  
MAGISTRATE COURTS:

The magistrate courts, in the absence of express statutory authorization, do not have the authority to, by general rule applicable to all cases, require that a plaintiff make a deposit of \$12 when a defendant in a civil case requests a jury trial.

OPINION NO. 56

January 17, 1973

Honorable George E. Murray  
Representative, District 90  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Murray:

This opinion is in response to your question in which you ask:

"Does the Magistrate Court have the right in a pending case where a jury is requested by defendant, subsequent to the filing of the case, to compel the plaintiff to post an additional deposit for Court costs."

You further state that:

"The Magistrate Courts of St. Louis County require a deposit for costs by way of a filing fee at the time any matter is heard. It has been their custom that when the defendant subsequently would file a request for a jury, that the Court would then order that the plaintiff be compelled to post an additional \$12 by way of deposit for jury Court costs which may thereafter be accrued and charged. When questioned concerning this and asked for statutory authority, the various Magistrates could only reply that this has always been done, and they could point to no authority, but stated that they believed it to be within the 'inherent power of the Court'."

The applicable statute is Section 517.630, RSMo, which provides:

"Before the magistrate shall commence an investigation of the merits of the cause, by an

Honorable George E. Murray

examination of the witnesses, or the hearing of any other testimony, either party may demand that the cause be tried by a jury, which jury shall be composed of twelve good and lawful persons having the qualifications of jurors in the circuit court, unless the parties shall agree on a less number, in which case the jury shall consist of the number agreed upon, not less than six; provided, that three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel. If the verdict be rendered by the entire panel, the foreman alone may sign it, but if rendered by a less number than the entire panel, it shall be signed by all the jurors who agree to it."

We have assumed of course that you are referring to civil cases inasmuch as you refer to the "plaintiff."

We believe that the question is decided by the opinion of the Supreme Court of Missouri in Meadowbrook Country Club v. Davis, 421 S.W.2d 769 (Mo. banc 1967) wherein the court held that in a circuit court proceeding on an appeal from the magistrate court, the circuit court could not by rule condition the defendant's waiver of jury in any mode not prescribed by statute or contrary to the Rules of the Supreme Court. The Supreme Court held the circuit court erred in denying a jury trial where the only reason for the refusal to provide the defendant with a jury was his failure to make a timely written demand and a deposit required under the circuit court rule. That case, of course, applied to the circuit court and the Supreme Court expressly noted that it did not find it necessary to consider the requirement of a deposit separately from the other requirements of the rule; however, it is our view that the holding of that case is applicable in the premises. For similar instances where the courts of appeals have invalidated court rules as conflicting with the statutes and the Supreme Court Rules, see Wade v. Wade, 395 S.W.2d 515 (St.L.Ct.App. 1965) and Commerce Trust Company v. Morgan, 446 S.W.2d 492 (K.C.Ct.App. 1969).

The argument has been advanced that Section 517.160, RSMo, is authority for such a rule. Section 517.160 provides:

"If the plaintiff is a nonresident of the county, or shall become a nonresident after the commencement of a suit, or if from any cause the magistrate shall be satisfied that he is unable to pay the costs, the magistrate shall

Honorable George E. Murray

rule the plaintiff, on or before the day in the rule named, to give security for the payment of costs in such suit; and if the plaintiff fail on or before the day in such rule named to file the obligation of a responsible person of the county whereby he shall bind himself to pay all costs that have or may accrue in such action, or to deposit a sum of money equal to the costs that have accrued and will probably accrue in the same, the magistrate, on motion, shall dismiss the suit unless security is given before the motion is determined."

This office previously rejected this theory in Opinion No. 18 dated February 11, 1948, to Combs, copy enclosed, in which we held that a magistrate cannot require a deposit for costs in excess of that specified by statute in civil proceedings by a general rule of court applicable to all cases. We agree with the holding of that opinion but modify it to the extent that the reference therein to what is now Section 514.020 (then Section 1402, RSMo 1939) should have properly been to Section 517.160. We also enclose Opinion No. 57 dated March 26, 1947, to Marr, which holds that a magistrate court does not have the power to require security in every case for costs in excess of that provided by statute. The magistrate may, of course, require additional security for costs in the precise circumstances permitted by statute.

Under the provisions of Section 517.630, which we have cited, either party may demand a jury and there is no provision that we are able to find which conditions the right to a jury under that section on an additional deposit for jury costs. Further, we find no authority for the magistrate court to prevent the plaintiff from proceeding to trial because of his refusal to deposit such costs when the defendant demands a jury by a rule applicable to all cases.

We do not pass upon the general authority of the magistrate court to promulgate rules. We simply note that in the premises it is our view that the rule in question is invalid.

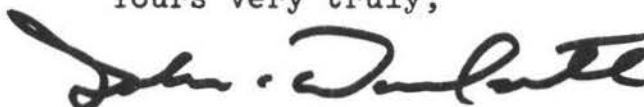
#### CONCLUSION

It is the opinion of this office that the magistrate courts, in the absence of express statutory authorization, do not have the authority to, by general rule applicable to all cases, require that a plaintiff make a deposit of \$12 when a defendant in a civil case requests a jury trial.

Honorable George E. Murray

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 18  
2-11-48, Combs

Op. No. 57  
3-26-47, Marr

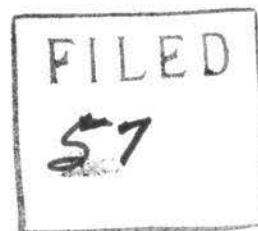
PROSECUTING ATTORNEY:

The provision of Sections 56.065 and 56.270, Senate Bill No. 515, Second Regular Session, 76th General Assembly, relating to prosecuting attorneys apply to a county of the second class in which the circuit court sits in more than one city in such county and do not apply to a second class county in which the circuit court sits in only one city unless said county has a population of more than 100,000.

OPINION NO. 57

February 1, 1973

Honorable A. J. Seier  
Prosecuting Attorney  
Cape Girardeau County  
721 North Sunset  
Cape Girardeau, Missouri 63701



Dear Mr. Seier:

This is in response to your request for an opinion from this office as follows:

"Do Sections 56.065 and 56.270 (which are effective 1/1/73) apply to second-class counties within a multi-county judicial Circuit Court thereby necessitating the Circuit Court sitting in 'more than one city'?"

"According to my information, Senate Bill 515 was introduced by Senator Bradshaw as a 'local bill' during the last Legislative Session. Supposedly this Bill would affect only Jasper County which is a second-class county wherein the Circuit Court sits in more than one city within that County. It would also affect any county with a population of more than 100,000, e.g. Jefferson County.

"In researching the number of second-class counties that are in multi-county circuits, I find that six out of the nine second-class counties would be affected by these statutes if it is determined that they fall within the language of the statutes 'or in a county of the second class in which the Circuit Court sits in more than one city. . .'

Honorable A. J. Seier

"Since this affects the practice of law for certain prosecutors and their budgets for the calendar year 1973, we earnestly request an immediate opinion."

In substance you inquire whether Sections 56.065 and 56.270 as enacted in Senate Bill No. 515, Second Regular Session, 76th General Assembly and which became effective January 1, 1973, apply to second class counties in which the circuit court sits in only one city in said county but does sit in cities in the other counties of the circuit.

Section 56.065, RSMo, provides:

"Notwithstanding the provisions of section 56.360, the prosecuting attorney of every first class county having a charter form of government and of counties of the second class having a population of more than one hundred thousand inhabitants or in a county of the second class in which the circuit court sits in more than one city shall devote his full time to his office, and, except in the performance of his official duties, shall not engage in the practice of law." (Emphasis added)

Section 56.270, RSMo, provides as follows:

"The prosecuting attorney in all counties of the second class having a population of more than one hundred thousand inhabitants or in a county of the second class in which the circuit court sits in more than one city shall receive for his services an annual salary of twenty thousand dollars. The prosecuting attorney in all other counties of the second class shall receive for his services an annual salary of fourteen thousand dollars." (Emphasis added)

It is our view that the underlined provision of the above statutes apply only to second class counties in which the circuit court sits in more than one city within the same county. They do not apply to second class counties in which the circuit court sits in only one city in the second class county even though the circuit court is held in cities in the other counties within the judicial circuit.

Honorable A. J. Seier

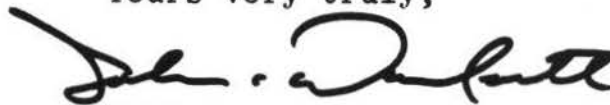
These sections do apply to the prosecuting attorney in all counties of the second class having a population of more than 100,000 inhabitants.

#### CONCLUSION

It is the opinion of this office that the provisions of Sections 56.065 and 56.270, Senate Bill No. 515, Second Regular Session, 76th General Assembly, relating to prosecuting attorneys apply to a county of the second class in which the circuit court sits in more than one city in such county and do not apply to a second class county in which the circuit court sits in only one city unless said county has a population of more than 100,000.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", with a stylized, flowing script.

JOHN C. DANFORTH  
Attorney General



SCHOOLS: Section 170.051, S.C.S.S.B. 638,  
TEXTBOOKS: 76th General Assembly, requires  
TUITION: a public school district to  
"purchase and loan free all text-  
books" for children resident of the district who are enrolled  
in kindergarten classes held in a school which also enrolls  
students seven years of age or older.

OPINION NO. 58

August 21, 1973



Dr. Arthur L. Mallory  
Commissioner of Education  
State Department of Education  
Jefferson State Office Building  
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This official opinion is in response to your request for  
a ruling on the following question:

"Does Section 170.051, RSMo, S.C.S.S.B.  
638, require a public school district to  
'purchase and loan free all textbooks' for  
children resident of the district who are  
enrolled in kindergarten classes?"

Section 170.051, V.A.M.S., is part of Senate Committee Sub-  
stitute for Senate Bill No. 638, enacted by the General Assembly  
in 1972. The heart of the law is contained in the first three  
subsections of Section 170.051, V.A.M.S., which read as follows:

"1. As used in this Section, the fol-  
lowing terms shall have the meaning indi-  
cated unless the context otherwise requires:

"(1) 'Textbook', means workbooks, man-  
uals, or other books, whether bound or in  
looseleaf form, intended for use as a prin-  
cipal source of study material for a given  
class or group of students, a copy of which  
is expected to be available for the individ-  
ual use of each pupil in such class or group.

Dr. Arthur L. Mallory

"(2) 'School', means any elementary or secondary school, public or nonpublic, non-profit, within this state, and wherein a resident of the state may legally fulfill the compulsory school attendance school requirements of Section 167.031, RSMo.

"2. Each public school board shall purchase and loan free all textbooks for all children who reside in the district and attend an elementary or secondary school in this state.

"3. Textbooks shall be loaned to all pupils residing in the district on an equitable basis and without discrimination on the grounds of race, creed, color, national origin, or school attended."

The remainder of Section 170.051 and all of Section 170.055, V.A.M.S., provide the mechanism for the purchase, distribution, and control of the textbooks.

Under subsection 2 of Section 170.051, textbooks shall be loaned to all children residing in the school district and attending "an elementary or secondary school in this state." You ask whether a student enrolled in kindergarten is attending an elementary school within the meaning of Section 170.051.

In Section 160.011, RSMo 1969, "public school" is defined to include "all elementary and high schools operated at public expense. . . ." Only two classifications of schools are provided for, elementary and high schools. There is no third classification of schools called kindergarten schools.

In the same section, "elementary school" is defined as "a public school giving instruction in two or more grades not higher than the eighth grade. . . ." In this definition, no limit is placed on where elementary school begins.

In determining the probable intent of the Legislature concerning this question, we may look to administrative regulations in force at the time the law was approved, since the Legislature acts within the framework of the ongoing operation of Missouri schools. England v. Eckley, 330 S.W.2d 738 (Mo. banc 1959); Community Memorial Hospital v. City of Moberly, 422 S.W.2d 290

Dr. Arthur L. Mallory

(Mo. 1967); and Farmers State Bank v. Stewart, 454 S.W.2d 908 (Mo. banc 1970). When we do this, we find that the State Board of Education, the agency entrusted with the duty of supervising public education in Missouri, treats kindergarten as part of elementary school.

In the School Administrator's Handbook (Publication No. 20-H, 1969), published by the State Board of Education and filed with the Secretary of State, various rules and regulations are set out, among which are those pertaining to the classification of Missouri public schools. Classification is a responsibility of the State Board of Education pursuant to Section 161.092(9), RSMo 1969. "Elementary school" is defined in the Handbook at pages 115-116 as "that part of a school system which has a distinct organization including grades within the limits of kindergarten through eight inclusive." Immediately thereafter "kindergarten" is defined as "that part of the elementary school which provides appropriate learning activities for children five years of age." Thus, when the State Board of Education looks at elementary schools for evaluation and classification purposes, it considers kindergartens as an integral part of the elementary school.

We are aware of the reference in Section 170.051 to the compulsory school attendance law (Section 167.031, RSMo 1969) and of the reference in Section 170.055 to the district's enumeration list (Section 167.011, RSMo 1969), as a basis for the distribution of funds credited to the county foreign insurance tax fund for the purchase of textbooks. Neither the compulsory school attendance law nor the enumeration list law includes kindergarten-age students. We believe that the reference to the compulsory school attendance law was made in an effort to assure that students receiving aid under this Act were attending bona fide schools recognized by the state, and that the reference to this law was not meant to exclude from the benefits of the Act students attending kindergarten at qualified schools. (However, in the event that a school offers only kindergarten, or kindergarten and pre-school, classes and does not enroll any students seven years of age or over, then students attending that school would not be entitled to free textbooks.) Similarly, the pupil enumeration list is the only census currently available listing the school-age population (between 6 and 20) by school district regardless of schools attended. The use of the enumeration list to determine a district's share of the foreign insurance tax moneys used to finance

Dr. Arthur L. Mallory

the law does not indicate the Legislature's intent to exclude kindergarteners from the benefits of the Free Textbook Act.

Based on the foregoing, both as a matter of legal definition and administrative interpretation, we conclude that kindergarten is commonly thought to be a part of an elementary school. We find no language in Section 170.051 which indicates that the Legislature chose to have the term "elementary school" defined more narrowly for the purposes of that section than it is in other portions of the school laws and regulations.

#### CONCLUSION

Therefore, it is the opinion of this office that Section 170.051, S.C.S.S.B. 638, 76th General Assembly, requires a public school district to "purchase and loan free all textbooks" for children resident of the district who are enrolled in kindergarten classes held in a school which also enrolls students seven years of age or older.

The foregoing opinion, which I hereby approve, was prepared by my assistants, Richard E. Vodra and D. Brook Bartlett.

Very truly yours,

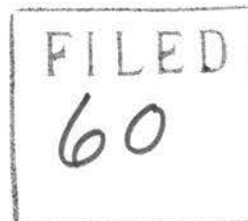
A handwritten signature in black ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

LICENSES: Under Section 1 of H.C.S.H.B. No.  
NURSING HOMES: 204, 76th General Assembly, Second  
DIVISION OF HEALTH: Regular Session, the Division of  
DIVISION OF MENTAL HEALTH: Mental Health is required to adopt  
rules for all institutions accept-  
ing the mentally retarded including facilities operated by the  
Division itself. Homes and institutions which are licensed under  
the provisions of Chapter 198 as nursing homes by the Division  
of Health and which come within the provisions of Section 2 et  
seq., of H.C.S.H.B. No. 204 must also be licensed by the Division  
of Mental Health and must conform to the rules and regulations  
promulgated by the respective Divisions.

OPINION NO. 60

January 17, 1973



Dr. Harold Robb, Director  
Division of Mental Health  
Department of Public Health & Welfare  
722 Jefferson Street  
Jefferson City, Missouri 65101

Dear Dr. Robb:

This opinion is in response to your request in which you  
ask:

"a) Do the statutes (Section 202.831 V.A.M.S.  
House Bill No. 204, 76th General Assembly,  
Second Regular Session) and any proposed rules  
or standards issued by the Division of Mental  
Health under the statutes apply to state fa-  
cilities operated by the state?

"b) Will licenses issued by the Division of  
Mental Health be required of nursing homes  
having one or more retarded persons where  
such homes have already been licensed by the  
Division of Health as licensed nursing homes?"

Section 1 of H.C.S.H.B. No. 204, 76th General Assembly,  
Second Regular Session, provides:

"The division of mental health shall adopt  
reasonable rules, regulations and standards

for all institutions, public or private, which may accept mentally retarded persons for care, treatment and custody. Those rules, regulations and standards shall provide for different types of institutions, and shall be designed to promote and regulate safe and adequate facilities for the care and treatment of mentally retarded persons. The rules, regulations and standards shall particularly provide for

- (1) The admission and commitment of the mentally retarded;
- (2) Their education and training;
- (3) Their general medical and health care;
- (4) Adequate physical plant facilities, including housekeeping and maintenance standards;
- (5) Food service facilities;
- (6) Safety precautions;
- (7) Drugs and medications;
- (8) A uniform system of record keeping; and
- (9) Standards of patients' rights." (Emphasis added)

Section 2 provides:

"The division shall establish a procedure for the licensing of all homes or institutions which accept mentally retarded persons for care, treatment or custody, except those state institutions operated by it. Applications for a license shall be made to the division upon forms provided by it and each application shall contain such information as the division requires, which may include affirmative evidence of ability to comply with the reasonable rules, regulations and standards adopted by the board. Each application for a license, except applications from a governmental unit, shall be accompanied by an annual license fee of seventy-five dollars for establishments which accept less than ten patients, and one hundred fifty dollars from establishments which accept ten or more. All license fees shall be paid to the collector of revenue for deposit in the general revenue fund of the state treasury." (Emphasis added)



Dr. Harold Robb

The other sections of the bill provide for application, licensing, revocation, suspension and appeal, and establish an effective date of January 1, 1973 for the licensing of such facilities.

Notably what is now Section 1 of the bill was formerly Section 5 of House Bill No. 1099, 76th General Assembly, Second Regular Session, which did not pass. The latter bill attempted to provide for a separate division of mental retardation and would have created a "board of mental retardation" which would have been empowered to appoint a director of such division and to establish rules, regulations and standards for all institutions, public or private, which accept mentally retarded persons for care, treatment and custody. What was Section 5 of House Bill No. 1099 and the sections which followed Section 5 of House Bill 1099, with minor changes, was introduced and added to and made a part of H.C.S.H.B. No. 204. The only change in Section 5 respecting the adoption of rules was that "board of mental retardation" was deleted and in its place the words "division of mental health" was inserted. Thus it appears from the legislative history of the section in question that the words "all institutions, public or private" was intended to be all inclusive and to include all state institutions which accept mentally retarded persons for care, treatment and custody.

It is true of course that the state and its agencies are not normally within the purview of a statute unless the intention to include them is clearly manifest. This rule was expressed by the Supreme Court of Missouri in Hayes v. City of Kansas City, 241 S.W.2d 888, 892 (Mo. 1951) in which the court citing from 59 C.J.S. 653, pp. 1103-1104, stated:

"The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication. This general doctrine applies with especial force to statutes by which prerogatives, rights, titles, or interests of the state would be divested or diminished; or liabilities imposed upon it; but the state may have the benefit of general laws, and the general rule has been declared not to apply to statutes made for the public good, the advancement of religion and justice, and the prevention of injury and wrong."



Dr. Harold Robb

It is our view that the broad language of Section 1, which we have underscored which includes all institutions, public or private, is sufficiently manifest to be within the general rule and includes all institutions of the state, including the institutions of the Division of Mental Health which provide for care, treatment and custody of the mentally retarded. Although the Division of Mental Health is not by name included it was not expressly excepted. By comparison the Division of Mental Health was excepted from the licensing provisions of Section 2 of the same bill thus fortifying our conclusion that there was no legislative intent to exclude the Division from the provisions of Section 1.

Clearly under Section 2, all such state institutions, except as we have noted, the state institutions which are operated by the Division itself, have to be licensed. This is because Section 2 applies to all governmental units and it is our view that if the legislature did not intend to include divisions or departments of state government within the term "governmental unit" it would not have been necessary to expressly except such institutions operated by the Division of Mental Health. It is also notable that many of the provisions of these sections were taken verbatim from Chapter 197, respecting the licensing of hospitals by the Division of Health. However, the term "governmental unit", although defined in Section 197.020, RSMo, as "any county, municipality or other political subdivision or any department, division, board or other agency of any of the foregoing" was not carried into the present bill. We conclude that in the context of the sections in question, the term "governmental unit" was intended to be all inclusive and includes state institutions except those operated by the Division itself.

With respect to your second question, it is our view that the provisions of Chapter 198 relative to the licensing of "nursing homes" as defined therein by the Division of Health and the provisions of H.C.S.H.B. No. 204 provide for the licensing of different types of facilities. It is obvious that the legislature felt a need for separate licensing of homes and institutions caring for the mentally retarded and it is thus clear that homes or institutions which fall under the provisions of Chapter 198, respecting licensing by the Division of Health and which also fall under the provisions of these sections, are required to be licensed by both the Division of Health and the Division of Mental Health and to conform to such regulations as are promulgated under and pursuant to the respective sections.

#### CONCLUSION

It is the opinion of this office that under Section 1 of H.C.S.H.B. No. 204, 76th General Assembly, Second Regular Session,

Dr. Harold Robb

the Division of Mental Health is required to adopt rules for all institutions accepting the mentally retarded including facilities operated by the Division itself. Homes and institutions which are licensed under the provisions of Chapter 198 as nursing homes by the Division of Health and which come within the provisions of Section 2 et seq., of H.C.S.H.B. No. 204 must also be licensed by the Division of Mental Health and must conform to the rules and regulations promulgated by the respective Divisions.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

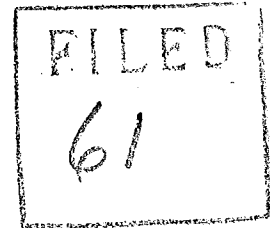
A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

April 11, 1973

OPINION LETTER NO. 61  
Answer by letter-Wood

Herbert R. Domke, M.D., Director  
Missouri Division of Health  
Broadway State Office Building  
Jefferson City, Missouri 65101



Dear Dr. Domke:

You have requested my legal opinion on the following question:

"Is the State Board of Health authorized by either Section 192.020, RSMo, or Sections 192.180 to 192.220, RSMo, to adopt and promulgate rules and regulations governing the location and construction of private water wells?"

The laws referred to are here set forth in their entirety:

"It shall be the general duty and responsibility of the division of health to safeguard the health of the people in the state and all its subdivisions. It shall make a study of the causes and prevention of diseases. It shall designate those diseases which are infectious, contagious, communicable or dangerous in their nature and shall make and enforce adequate orders, findings, rules and regulations to prevent the spread of such diseases and to determine the prevalence of such diseases within the state. It shall have power and authority, with approval of the director of public health and welfare, to make such orders, findings, rules and regulations as will prevent the entrance of infectious, contagious and communicable diseases into the state." Section 192.020, RSMo 1969

Herbert R. Domke, M.D.

"The division of health shall make and enforce adequate rules and regulations for the maintenance of a safe quality of water dispensed to the public and for the collection of samples and analysis of water, either natural or treated, furnished by municipalities, corporations, companies, or individuals to the public and shall fix the fees for any service rendered under the rules and regulations to cover the cost of the service." Section 192.180, RSMo 1969

"The analysis of all water required by this chapter shall be made by the division of health laboratories at Jefferson City, Missouri. All fees or other moneys payable under the provisions of said chapter shall be payable to and collected by the division of collection in the department of revenue and deposited in the division of health, water and sewage fund to be used in payment of expenses incurred by said division, and the state comptroller shall draw his warrant for claims against this fund after such claims have been approved by the director of the division of health. No fees under this section shall be paid by any city or municipality except when the waterworks is owned and operated by said city or municipality." Section 192.190, RSMo 1969

"Every municipal corporation, private corporation, company or individual supplying or authorized to supply water to the public within the state shall file with the division of health a certified copy of the plans and surveys of the water works with a description of the methods of purification and of the source from which the supply of water is derived, and no source of supply shall be used without a written permit of approval from the division of health, and no new supplies shall be established or dispensed to the public without first obtaining such written permit of approval. Whenever an investigation of any water supply, plant, or methods used shall be undertaken by the division of health, it shall be the duty of the municipality, corporation, company, institution

Herbert R. Domke, M.D.

or person having in charge the water supply under investigation to furnish on demand to the division of health such information as that body considers necessary to determine the sanitary quality of the water being dispensed. Approval of new water supplies for municipalities must necessarily involve consideration of sewage provisions for safety to the public health." Section 192.200, RSMo 1969

"Nothing in sections 192.180 to 192.220 shall apply to the municipal water supply in cities which a constant supervision of the said city water supply to insure a safe quality of water dispensed is conducted by or is acceptable to the city department of health of that city." Section 192.220, RSMo 1969

Section 192.020, RSMo, was enacted in its present form in 1919. L. Mo. 1919, p. 372. Sections 192.180-192.220, RSMo, were first enacted in 1919 and have not been subsequently amended in any material respect. L. Mo. 1919, p. 370. In fact, the enactment of present Section 192.020 (House Bill No. 711, 50th General Assembly) preceded that of present Sections 192.180-192.220 (House Bill No. 712, 50th General Assembly) by but three days.

Sections 192.180-192.220 pertain to persons dispensing or supplying water to the public, and thus would have no application to private water wells or wells used solely by their owners. Therefore, in our opinion, the State Board of Health would have no power to make and enforce rules and regulations applicable to private wells under Sections 192.180-192.220, RSMo.

However, we believe that the Board of Health could find and determine that private wells constitute a source of infectious, contagious or communicable disease and, under the authority of Section 192.020, RSMo, make and enforce reasonable and adequate rules and regulations governing the construction of such wells so as to prevent the entrance and spread of such diseases into this state. We think there can be no doubt as to the relationship between potable water and infectious, contagious or communicable disease.

". . . we take notice of the germ theory of disease, and that the human body may give off germs dangerous to the public health, and that, should these reach the intake of the water supply, they might, as suggested by the State Board

Herbert R. Domke, M.D.

spread contagion throughout the city." State v. Morse, 80 A. 189, 194 (Vt. 1911)

". . . the established scientific fact that water can serve as a carrier of disease germs to one drinking it is one within judicial notice . . ." State v. Heller, 196 A. 337, 340-341 (Conn. 1937)

In our opinion, the power of the Board of Health to thus regulate private water supply wells under Section 192.020, RSMo, is not denied by the legislature's simultaneous enactment of the law conferring regulatory jurisdiction over public water supply wells, Sections 192.180-192.220, RSMo.

"In Black on Interpretation of Laws, in speaking of statutes in pari materia, it is said: 'Especially is it the rule that different legislative enactments passed upon the same day or at the same session, and relating to the same subject, are to be read as parts of the same act.'"

"To like effect in 2 Lewis' Sutherland on Statutory Construction (2d Ed.) p. 845, whereat it is said: 'It is observed that in the comparison of different statutes passed at the same session or nearly at the same time this circumstance has weight; for it is usually referred to as indicating the prevalence of the same legislative purpose, as rendering it unlikely that any marked contrariety was intended.'"

"It is easy to see why the rule of construction pertaining to statutes in pari materia applies with peculiar force to statutes passed at the same session of a legislative body. In such case we have, in fact, the same minds acting upon the one subject. It is not to be presumed that the same body of men would pass conflicting and incongruous acts. The presumption is that they had in mind the whole subject under consideration; that, whilst the one general subject is touched in several separate acts, yet the legislative intent was that of a harmonious whole. In such case, it is the duty of the courts

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to so construe all the act in such manner that each and every part thereof may stand, if such construction can be attained, without doing violence to the language used in the several acts." State ex rel. Karbe v. Bader, 78 S.W.2d 835, 839 (Mo. banc 1934)

We consider Section 192.020, RSMo, a legislative direction to the Board of Health to adopt and enforce all regulations necessary and proper to the prevention of any infectious, contagious, communicable or dangerous disease. We view Sections 192.180-192.220, RSMo, as a legislative direction of certain minimal steps (i.e., regulation of public water wells) for the Board of Health to take to accomplish this same result, but not as restrictive of additional methods (i.e., regulation of private water wells) which the Board of Health might later find to be necessary for these purposes.

We are also mindful of the rule in this state that powers conferred upon boards of health relating to their safeguarding of public health receive a liberal construction from the courts. State ex rel. Horton v. Clark, 9 S.W.2d 635 (Mo. banc 1928). With particular reference to the subject of drinking water, a court in another jurisdiction has stated:

"When dealing with statutes which promote public health, safety and welfare, courts traditionally apply a liberal construction with respect to supervisory and regulatory powers--and this is certainly so with regard to water meant for human uses. . . ." City of Newark v. Department of Health of State of New Jersey, 262 A.2d 718, 724 (N.J.App. 1970)

And in the same vein, the Virginia Supreme Court of Appeals sustained a statute authorizing the formation of a water district, requiring all property owners therein to connect to the district water system and an implemental resolution of the district commission requiring all landowners to abandon their use and consumption of any private subsurface water. Weber City Sanitation Commission v. Craft, 87 S.E.2d 153, 157-160 (Va. 1955).

"So far as we know, the power of the State, under its police power, to provide for the health of its people, has never been questioned, but on the contrary, has been stressed as one of the powers which may be given the broadest application; and it is common knowledge that this power has been increasingly



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exercised, in keeping with advances made in the sciences of medicine and sanitation, in recent years. In these circumstance, courts are reluctant to place limits on what may be done in the interest of the health of a community, so long as unreasonable methods are not employed, nor the natural and constitutional rights of citizens invaded.

"The evidence introduced by both parties shows that the subsurface wells here involved, including the well of Craft, are on lots where septic tanks, cesspools and outdoor toilets are maintained; that the water from many of these wells has at one time or another been contaminated and unfit for human consumption, and at one time this was the situation with respect to the well on Craft's property.

\* \* \*

"If Craft and other citizens similarly situated could not be required to connect with the water system provided for under the act its effectiveness would be nullified.

\* \* \*

"The exercise of the police power cannot be circumscribed within narrow limits nor can it be confined to precedents resting upon conditions of the past. As civilization changes and advancements are made the police power must of necessity develop and expand to meet such conditions."

The importance which the legislature of Missouri has attached to public health regulations adopted by the State Board of Health is reflected in the following statutory provision:

"All rules and regulations authorized and made by the division of health in accordance with this chapter shall supersede as to those matters to which this chapter relates, all local ordinances, rules and regulations and shall be observed throughout the state and enforced by all local and state health authorities. Nothing herein shall limit the right of local authorities to make such further ordinances, rules

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and regulations not inconsistent with the rules and regulations prescribed by the division of health which may be necessary for the particular locality under the jurisdiction of such local authorities." Section 192.290, RSMo

We conclude that the State Board of Health has the authority to promulgate regulations with respect to private water wells. However, we emphasize that in order to sustain the regulation of private water wells under Section 192.020, RSMo, it is first necessary that the Board of Health:

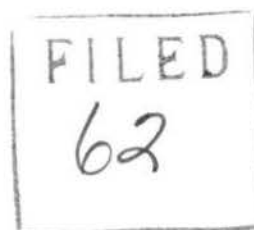
- (1) Make a study of diseases;
- (2) Designate those specific diseases which are contagious, communicable, infectious or dangerous;
- (3) Adopt only such regulations pertaining to private water wells as are reasonably designed to prevent the spread of such designated diseases.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

January 5, 1973

OPINION LETTER NO. 62  
Answer by letter-Mansur



Honorable Frank Bild  
State Senator, District 15  
State Capitol Building  
Jefferson City, Missouri 65101

Dear Senator Bild:

This is in response to your request for an opinion from this office as follows:

- "1) Is the city clerk required to be a resident of the city?
- "2) Are non-elective officers or city employees of a 4th class city required to be residents of such a city?
- "3) If non-elective officers or office employees of a 4th class city are required to be residents of such a city, which non-elective officers or city employees must meet this requirement?"

Residency qualifications for officers elected or appointed to office in the city of the fourth class are found in Section 79.250, RSMo, as follows:

"All officers elected or appointed to offices under the city government shall be qualified voters under the laws and constitution of this state and the ordinances of the city except that appointed police officers, the city attorney, and other employees having only ministerial duties need not be registered voters of the city. No person shall be elected

Honorable Frank Bild

or appointed to any office who shall at the time be in arrears for any unpaid city taxes, or forfeiture or defalcation in office. All officers, except appointed police officers, the city attorney, and other employees having only ministerial duties, shall be residents of the city."

We are enclosing herewith an opinion issued by this office to the Honorable David H. Jackson, Prosecuting Attorney of St. Clair County, Osceola, Missouri, on December 23, 1969, in which we stated that a person may be appointed as a policeman in a fourth class city who is not a resident of such city.

Section 79.250, supra, provides that ". . . All officers, except appointed police officers, the city attorney, and other employees having only ministerial duties, shall be residents of the city."

In answer to your first question whether the city clerk is required to be a resident of the city, our answer is in the negative insofar as specific provisions of Section 79.320, RSMo, are concerned. Such section provides as follows:

"The board of aldermen shall elect a clerk for such board, to be known as 'the city clerk,' whose duties and term of office shall be fixed by ordinance. Among other things, the city clerk shall keep a journal of the proceedings of the board of aldermen. He shall safely and properly keep all the records and papers belonging to the city which may be entrusted to his care; he shall be the general accountant of the city; he is hereby empowered to administer official oaths and oaths to persons certifying to demands or claims against the city."

It is our view that duties of the city clerk of a fourth class city provided for in Section 79.320, supra, are ministerial. Under the specific provisions of Section 79.250, supra, the clerk who has only ministerial duties is exempt from the residency requirements. We have no information as to duties or responsibilities imposed on the clerk by ordinance and do not pass on the question whether he is required to be a resident of the city if other than ministerial duties are placed on him by ordinance.

In answer to your second question whether non-elective officers or city employees of a fourth class city are required to be residents of such city depends entirely upon the duties of such

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officers. In Yelton v. Becker, 248 S.W.2d 86 (St.L.Ct.App. 1952) the court stated, l.c. 89:

" . . . Ministerial duties are those duties of a clerical nature which a public officer is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed. . . ."

We are unable to give a definite answer to your second and third question without having definite information as to the duties they are to perform in order to determine whether their duties are only ministerial. If they are not ministerial, they have to be residents of the city.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 516  
12-23-69, Jackson

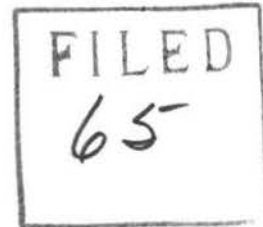
CONFLICT OF INTEREST:  
GOVERNOR:

The disclosure of assets procedure contemplated by Governor-elect Christopher S. Bond complies with the requirements of Section 105.460, RSMo, of the conflict of interest law, which permits filings disclosing substantial interests during each session of the General Assembly in lieu of separate filings of substantial personal or private interests by the Governor in any bill before passing on such bill.

OPINION NO. 65

January 5, 1973

Honorable Christopher S. Bond  
Governor-elect  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Governor-elect Bond:

This opinion is in response to your question asking:

"Upon taking office as Governor, I plan to comply with the economic interest disclosure provisions of Section 105.460, RSMo 1969, by listing assets I then own.

"Subsequently, I plan to place in a 'blind trust' all of my investment assets, excluding only real estate held for the personal use of my wife and myself, automobiles and other personal property used by us, and cash held in checking or savings accounts. The trustee of this trust will be some financial institution outside the State of Missouri and not regularly subject to regulation by or engaged in financial dealings with the State of Missouri.

"Under terms of the trust, the trustee will be empowered to sell and buy assets for investment purposes, to exercise stock voting rights or other prerogatives of ownership in the assets, to make such changes generally as are necessary in the investments and will be instructed not to advise me of the

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assets in the trust or any proposed changes in the assets in the trust.

"I will reserve the rights to receive the income from the trust, to additional cash or other assets to the trust, to direct that the trustee turn over assets in such form as it deems desirable to charities and others in dollar amounts that I designate and set general guidelines in terms of investment objectives, such as capital gains and income for the trustee.

"All taxes owed on the investments will be computed by a certified public accounting firm, and I will pay the amounts indicated without learning the identity of the assets so held.

"Each successive year after making the disclosure required under Section 105.460, RSMo 1969, I shall file a statement as required under that section listing any assets not in the 'blind trust' and that investment assets are held for me in the trust and income is received by me from the trust. Such be the case, I will further state that I have no knowledge of assets held within the trust, or if I do gain knowledge of some or all of the assets in the trust, I shall state such knowledge.

"At any time during my term of office as Governor I exercise the power to revoke the trust, I will immediately thereupon file a statement indicating such action with the authority designated to receive reports under Section 105.460, RSMo 1969.

"Your official opinion is requested: (a) as to whether the disclosure policies outlined above for succeeding years comply with both the letter and the intent of Section 105.460, RSMo 1969, and (b) as to whether the transactions described above would conflict with any other laws of the State of Missouri."

The pertinent provisions are found in Sections 105.450 and 105.460, RSMo.



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Section 105.450, provides:

"As used in this act, unless the context clearly requires otherwise, the following terms have the meanings indicated:

(1) 'Agency', any department, office, board, commission, bureau, institution or any other agency, except the legislative and judicial branches of the state or any political subdivision thereof including counties, cities, towns, villages, school, road, drainage, sewer, levee and other special purpose districts;

(2) 'Business entity', a corporation, association, firm, partnership, proprietorship, or business entity of any kind or character;

(3) 'Regulatory agency', any agency which issues licenses, fixes rates, promulgates rules and regulations which affect more than its internal operation, holds formal hearings or makes determinations;

(4) 'Substantial interest', ownership by the individual or his spouse directly or indirectly, of ten per cent or more of any business entity, or of an interest having a value of ten thousand dollars, or more, or the receipt by an individual or his spouse of a salary, gratuity, or other compensation or remuneration of six thousand dollars or more per year from any individual, partnership, organization, or association;

(5) 'Substantial personal or private interest in any measure or bill', any interest in a measure or bill which results from the combined definitions of sub-sections (2) and (4) of this section."

Section 105.460, provides:

"The governor, lieutenant governor and any member of the general assembly who has a substantial personal or private interest in any measure or bill proposed or pending before the general assembly shall, before he passes

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on the measure or bill, file a written report of the nature of the interest to the chief clerk of the house or the secretary of the senate and such statement shall be recorded in the journal. However, if the governor, lieutenant governor or any member of the general assembly desires, at the beginning of any regular or special session, or any time during said regular or special session, to disclose substantial interests that he or she may have at any time during the session then he or she shall thereafter be relieved from filing a written report on each measure or bill proposed or pending. Said disclosure by anyone named in this section of substantial interests shall be filed in writing with the chief clerk of the house or the secretary of the senate and shall be recorded in the journal. If during the session a person named in this section and who has filed substantial interests shall require the filing of a further substantial interest as herein defined then he may add same to his filing as herein provided and the same shall be recorded in the journal."

We understand from the first sentence of your question that the first filing that you make will list all assets that you own including those to be placed in the blind trust.

Your successive annual filings contemplate no disclosure of the unknown assets held in the blind trust but will state that assets are held for you in the trust and that income is received by you from the trust. This procedure as outlined in your above statement, in our view, meets the requirements of Section 105.460.

We know of no Missouri laws which would be violated by the procedure described by you.

#### CONCLUSION

It is the opinion of this office that the disclosure of assets procedure contemplated by Governor-elect Christopher S. Bond complies with the requirements of Section 105.460, RSMo, of the conflict of interest law, which permits filings disclosing substantial interests during each session of the General Assembly in lieu of separate filings of substantial personal or private interests by the Governor in any bill before passing on such bill.

Honorable Christopher S. Bond

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a long horizontal stroke at the end.

JOHN C. DANFORTH  
Attorney General

SCHOOLS:

School districts may not charge fee for summer or night school to residents under twenty-one; may make charges for damage to school property and for extracurricular activities; must provide band instruments if credit is given for band participation; must furnish gym shoes to indigents; must furnish materials for making products as part of classes; may withhold transcript from student if he fails to pay a legal fee imposed for misuse of school property.

OPINION NO. 66

March 7, 1973

Dr. Arthur L. Mallory  
Commissioner of Education  
Department of Education  
Jefferson State Office Building  
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This opinion is in response to your request for a ruling on the constitutional legality of the following eight practices:

- "1. May a school district charge a fee for summer school where the course work is given for credit applicable to meet graduation requirements?
- "2. May a school district charge a fee for night school where the course work is given for credit applicable to meet graduation requirements?
- "3. May a school district make charges for library late returns, damaged books, lost books, et cetera?
- "4. May a school district withhold transcripts from pupils who do not pay fees and charges?
- "5. May a school district require students to wear soft-soled shoes and uniforms for participation in physical education classes? If so, must they be provided from school district funds?

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- "6. May a school district charge students for non-required activities such as yearbooks, assemblies, and athletic events?
- "7. May a school district require band members to furnish their own instruments or rent them from the school?
- "8. May a school district require students to provide materials for use in constructing or making products or items in classes offered for academic credit?"

The starting point for this opinion is Section 1(a) of Article IX of the Missouri Constitution of 1945, which reads in relevant part as follows:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law. . . ."

This office recently ruled that Section 1(a) forbids a school district from charging any fee to any resident student who wishes to enroll in a course offered for academic credit by that school district. Opinion No. 269, Hill, December 1, 1972. That opinion was specifically concerned with a \$35 fee per student for an automobile driver's training course offered during the regular school term. In this request, you have asked us to explore the ramifications of that opinion as they relate to problems more difficult than a simple tuition charge for a course.

(1) Fees for summer school.

Missouri school districts are authorized to offer summer school programs by Section 178.280, RSMo 1969, approved first in 1961 (L. 1961, p. 353), which reads as follows:

"The school board of any six-director district, in its discretion, may establish and maintain summer schools, making all necessary rules and regulations therefor and fixing the rates of tuition of resident pupils above the age of twenty years and of others who are not entitled to receive free public school privileges in the

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district. At its discretion, the board may require tuition of all pupils resident in the district attending the summer school, or may provide for the payment of all or part of the cost thereof for those resident in the district under the age of twenty years from tax money of the district; but no funds from the state of Missouri shall be provided or used for the summer schools."

As can be seen, this section specifically authorizes the school district to impose tuition charges on all students, even though those students are normally eligible for free public schools; the section also provides that no state aid may be used for summer school.

In passing this section, the General Assembly apparently desired to authorize the local school district to establish summer schools and finance them any way they could, without making the summer schools part of the state system of education mandated by the Constitution. A similar approach found favor with the Montana Supreme Court in the case of Granger v. Cascade County School District No. 1, 499 P.2d 780 (1972). In that case, the court, following recent precedent from Idaho and Michigan, held that a constitutional requirement of free public schools does not allow charges for courses and activities given credit toward graduation; the court, however, did not extend its ruling to include summer school, for the following reason:

"In applying the foregoing principle or test, we wish to make it clear that it applies only to courses and activities offered by the school district during the regular academic years as a part of normal school functions. It has no application to supplementary instruction offered by the school district on a private basis during the summer recess or at special times. The latter are both historically and logically not included in the free public school system required by our Constitution. Accordingly, reasonable fees and charges may be imposed therefor."  
499 P.2d at 786

It could be argued, contrary to the conclusion of the Montana court, that summer school has become "included in the free public school system required by our Constitution." Attendance in a Missouri summer school is credited towards the four-year school attendance requirement at the rate of two units of summer school for one-half year of "regular" school. School Administrator's Handbook (State



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Dept. of Ed. Pub. No. 20-H, 1969) p. 104. Students who fail courses during the regular year can repeat them in the summer; students may take required courses in the summer to free themselves for more electives during the school year, and so on. In general, summer school has become an avenue available to students who choose it to improve their public school program.

The fact question of whether or not summer school is part of the free public school system need not be decided here, however, for it is our view that the legislature determined that summer school must legally be deemed to be free when, in 1969, it amended the state school aid computation formula found in Section 163.031, RSMo Supp. 1971, in such a way that state aid is now given for summer school. L. 1969, p. 268. This section reads in relevant part as follows:

"1. School districts which meet the requirements of section 163.021 shall be entitled to a minimum guarantee computed as follows: The average daily attendance of pupils residing in the district shall be multiplied by four hundred dollars . . . plus an amount determined by multiplying the equivalent full-time average daily attendance of resident pupils who attend summer school by thirty-five dollars. Full-time equivalency shall be determined on the basis of one hundred sixty clock hours of school in session during a six to eight week term. No district shall be entitled to aid for summer school attendance in excess of twenty percent of the total attendance during the regular term for the last preceding year for the biennium beginning in 1969. . . ."

The money required to pay for state school aid comes from the State School Moneys Fund. Section 163.031(7), RSMo Supp. 1971. This fund, created in Section 166.051, RSMo 1969, is the fund discussed in Sections 3(a) and 3(b) of Article IX of the Constitution as the vehicle for appropriations by the state for the support of free public schools.

It is our belief that the legislature is not authorized to spend any of the Public School Moneys Fund for any educational purpose which is not free, for to do so would contravene the Constitution. This being the case, the provisions of Section 178.280, which authorizes summer school tuition but not state aid, and the provisions of Section 163.031, which gives state aid to summer school, are in conflict. Applying the maxim that when two laws dealing with the same subject conflict, the more recent in time



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prevails over the older one, we must conclude that the legislature repealed the system of summer school financing in Section 178.280 (at least so far as it deals with residents of the school district not in excess of twenty years of age) when it approved the language now found in Section 163.031, RSMo Supp. 1971. We do not reach the question of whether the legislature could authorize tuition for public summer school when no state aid is furnished, since that issue is not before us.

(2) Fees for night school.

School districts are authorized to establish night schools by Section 178.290, RSMo 1969, which reads as follows:

"The school board in any urban district at its discretion, and the school board of any other six-director district or of any metropolitan district, upon the receipt of a petition signed by fifty or more freeholders requesting the action, may establish and maintain night schools, make all necessary rules and regulations therefor, fix the rates for tuition of pupils above the age of twenty years and of others who are not entitled to receive free public school privileges in the district, and have general charge and control over the school. The school board may grant the use of, or lease, any of the public school buildings in the district to any responsible party for the purpose of conducting a night school therein. If the use of a school building is granted or leased for the above named purpose, the party using it shall keep it clean and in good repair and leave it in as good condition as it was when he took charge of it. If the party using the school building fails to comply with this section, the school board shall refuse him further use of it until he complies with this section."

A comparison of Section 178.290, establishing night schools, and Section 178.280, establishing summer schools, shows that the legislature has not authorized the charging of tuition for night school programs to patrons eligible for free school in the district. Both sections authorize a school district to fix tuition rates for the respective programs to be charged resident pupils above the age of twenty years and "others who are not entitled to receive free public school privileges in the district," but only the summer school statute authorizes the board to "require tuition of all

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pupils resident in the district," including those pupils otherwise eligible for free public schools. The night school statute contains no such authorization. In light of the structural and substantive parallels between the two statutes, we must conclude that the legislature intended that a school district which establishes night school is not authorized to require tuition of pupils who are otherwise eligible to receive free public school privileges in that district. To allow a school district to charge tuition under these circumstances would require reading into the statute words which the legislature deliberately omitted. This conclusion does not, of course, apply to any privately operated night school, including those using public school facilities pursuant to the last part of Section 178.290.

(3) Charges for library fines and lost books.

You ask in this question whether a school district which has loaned its property to a student may charge that student for misuse of the property resulting in damage or destruction to the property or undue delay in returning the property. It is our view that such charges are authorized by Section 171.011, RSMo 1969, which reads in relevant part as follows:

"The school board of each school district in the state may make all needful rules and regulations for the organization, grading and government in the school district. . . ."

The right to receive gratuitous instruction at a free public school extends only to the right to be free from required charges imposed as part of the curriculum. Where the pupil increases the cost of his education by the willful or negligent destruction of property, the school district may make charges that will enable it to repair or replace the property. The student is in no way being charged for his education, but is merely being asked to replace property loaned to him for his temporary use. Of course, a school district may not assess damages in such a way that it becomes impossible for a student to avoid charges; students may not be charged for the reasonable wear and tear that occurs to a textbook in normal use, but they can be charged for unusual or unreasonable damage to property.

Similarly, library fines are imposed to encourage students to return books and other supplies promptly to the library so that they may be used by other students. As long as the rules of the library give a student reasonable opportunity to use the books for his work without incurring library fines, such fines do not violate the requirement for gratuitous instruction.

(4) Enforcing school charges.

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You ask next whether a school may enforce charges for lost books, etc., by withholding transcripts from students who have not paid them. This question seems to have been answered by the Springfield Court of Appeals in the case of State ex rel. Roberts v. Wilson, 297 S.W. 419 (1927) in which the court said that a school may withhold a transcript or certificate of attainment for nonpayment of fees properly charged, but may not do so if the fees themselves are illegal. The school district in that case, acting under the equivalent of Section 171.011, required the withholding of transcripts from students who had not paid a \$20 tuition fee required by the board; since the fee was illegal, any attempt to enforce the fee was similarly illegal.

We believe that a school may withhold a transcript from a pupil who has not paid a charge, if the charge was properly imposed by the school. This is so because the pupil has not complied with a legally-enacted rule and regulation of that school and therefore is not eligible to advance to a higher grade or graduate. Thus, a student may be required to return textbooks or pay for their replacement as a condition of receiving a transcript or certificate of achievement. However, a student's grades may not be withheld for the nonpayment of an illegal charge, such as a book or course fee, prohibited by the Constitution of the state of Missouri.

(5) Required gym shoes and uniforms.

Physical education classes are a required part of the curriculum of most Missouri public school students. Many schools require physical education students to have a particular type of clothing for gym activities, and in particular, many schools require soft-soled shoes for participation in physical education activities. You ask whether such a requirement is permissible and, if it is, whether a school which makes such a requirement must provide the clothing or shoes at public expense.

In Opinion No. 269, 1972, this office rules that a school itself may not require a fee of a resident pupil as a condition of enrolling in a course. The present question is one of a large number of questions which asks whether a school may require a student to purchase items from a third person as a condition of attending or participating in school activity. These charges could range from requiring students to buy a particular book at a local bookstore to requiring students to be clothed at school (and thereby indirectly requiring them to purchase such clothing). The first of the recent "free school" cases relied upon in Opinion No. 269, Paulson v. Minidoka County School District No. 331, 463 P.2d 935 (Idaho 1970) discussed this problem in these terms:

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"Appellants argue that if books must be provided free of charge then it becomes impossible to draw a line and even school clothing must be given away. This contention is answered by pointing out that clothing is not an item peculiarly necessary for the use of free schools-- everyone must be clothed if he walks the streets-- and it is an item of expense which is especially subject to personal taste in terms of the cost, quality and quantity of it used by any individual student." 463 P.2d at 939, n. 9

We believe that the approach taken by the Idaho court is a sound one. If a school district requires a particular textbook, no other book will do; rarely, however, does a school district require a particular article of clothing as a condition for going to the school. Following this rule, if a particular article of clothing, specified as to brand or style, were required, then the school would be required to furnish that clothing free of charge under the constitutional requirement of gratuitous instruction. If, on the other hand, the school merely requires a generic type of clothing which it is not unreasonable to expect the students to have in any event and which is necessary for safety, health, or protection of people or property, then that clothing need not be provided by the school.

It is the opinion of this office that a school may require t-shirts or soft-soled shoes as a condition of participation in physical education classes without providing those items at public expense. If, however, a school chooses to require a particular type of soft-soled shoe or uniform and it is likely that a substantial portion of the students will not have the required clothing, then the school is required to provide the clothing for all students who request it.

We recognize that there are some students for whom our assumption that students can be expected to own soft-soled shoes will not be valid. Indigent families may lack the means to supply their children with this type of clothing. Where this is the case, we believe that the children's right to obtain a free education guaranteed by the Missouri Constitution will be infringed by reason of their poverty if soft-soled shoes are required, and that such an infringement violates the United States Constitution. Boddie v. Connecticut, 401 U. S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); cf. United States v. Kras, U.S. , 34 L.Ed.2d 626, 93 S.Ct. , 41 U.S.L.W. 4177 (January 10, 1973). For this reason, any child who can show an inability to obtain soft-soled shoes must be provided with those shoes if they are required for physical education classes. Absent a showing of poverty, however, a student must provide his own gym shoes and clothing.



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(The full reach of the Supreme Court cases cited above is not yet clear, but we do not believe that they require a waiver of fees for optional activities or for student-incurred damages to school property. Only charges necessary for school participation would be covered.)

(6) Charges for nonrequired activities.

In this question you ask whether charges for school activities such as yearbooks, athletic events and assemblies are proper. Section 177.121, RSMo 1969, authorizes a school district to make admission charges for athletic events conducted in a school stadium. There are no statutory provisions which either allow or forbid charges for other nonrequired activities.

The only case which has ruled on the subject held that such charges are proper. In the Paulson case, supra, the court rules that:

" . . . it should be noted that, because social and extra-curricular activities are not necessary elements of a high school career, the constitution does not prohibit appellants from setting fees to cover costs of such activities to be paid by students who wish to exercise an option to participate in them." 463 P.2d at 938

However, the Paulson case also said that students may not be required to pay fees for extracurricular activities where the fees are a condition for attending the schools and are imposed regardless of whether a student participates in the extracurricular activities he pays for. We believe that the rule in Paulson is a salutary one, and states the applicable law in this field. The "instruction" which must be "gratuitous" under the Constitution extends only to classroom and academic credit programs, and does not include the activities outside the curriculum, even though those activities are sponsored by the school.

Therefore, it is the opinion of this office that a school district may charge students for nonrequired activities such as yearbooks, assemblies and athletic events, so long as participation in the activities or purchase of the product is not a school requirement. No school may require all students to pay a fee for any service, product or event as a condition of attendance without violating the constitutional mandate for gratuitous instruction.

(7) Band instruments.

Dr. Arthur L. Mallory

Many schools in Missouri require students either to furnish their own band instruments or to rent them at a fee from the school in order to participate in the band. It is our view that the legality of this practice turns on whether participation in band is given academic credit.

In our Opinion No. 269, 1972, we stated that a school may not charge a fee for a course offered during the regular school day for academic credit. In many schools, band is part of the regular school curriculum, with students receiving academic credit for participation, and the school receiving state aid because the band class is offered during the six hour required school day used for computing average daily attendance. If a school structures its band program in this way, we do not believe it is possible to distinguish between a band instrument which a student is required to furnish himself or rent from the school and a textbook which a student is required to furnish himself or rent from the school: in each case, a student is required to make an expense as a condition of participating in an instructional activity which is part of the regular curriculum.

On the other hand, if a school removes band from the regular curriculum and does not give academic credit for participation in band, then band occupies the same status as any other optional extracurricular activity for which fees or charges may be required. The test is whether the school, by giving academic credit, or the state, by granting state aid, has declared the activity to be a part of the free public school system. If neither body has so acted, then fees or charges may properly be made.

(8) Student-supplied fabrication materials.

In your last question you ask whether a school district may require a student to provide his own material used in constructing or making products in classes offered for academic credit. We presume that you are referring to shop, home economics, art, and other similar classes in which the educational process requires the consumption of raw materials and the fabrication of finished products ranging from sculpture and table lamps to clothing and baked goods.

Since these materials are an integral part of the course, and indeed are required for successful completion of the course, a school may not require students to provide these materials without violating the constitutional mandate for gratuitous instruction. In this respect, a school district's expenses in operating this type of course, while higher than normal, have no different legal status than other expenses necessary to instruct pupils in any other course. However, it should be noted that the products made by the student become the property of the school, since the school provided the materials, and may be disposed of according to law.

Dr. Arthur L. Mallory

In the context of this opinion, it should be noted that the conclusions we reach with regard to free schools are based on opinions of the Supreme Courts of Idaho, Michigan, and Montana cited in this opinion and in Opinion No. 269, 1972. We are aware that the Supreme Court of Illinois in Hamer v. Board of Education of School District No. 109, 265 N.E.2d 616 (1970) reached a different result; the court there held that "free" in "free public schools" included only tuition charges, and schools are not forbidden from charging textbooks rentals or other fees required of students. We have examined both lines of authority, and we believe that the more legally sound is the one represented by the majority view which reads "free" more broadly. The legality of a fee must be based more firmly than on the distinction of nomenclature between "tuition fees," "incidental fees," and "textbook fees" especially since the money usually flows into the same treasury under any name.

#### CONCLUSION

It is, therefore, the opinion of this office that:

- (1) A school district may not charge fees for summer school to residents of the school district under twenty-one years of age, under prevailing statutes.
- (2) A school district may not charge fees for night school to residents of the school district under twenty-one years of age, under prevailing statutes.
- (3) A school district may make reasonable charges for damage or misuse of school property, such as library fines or charges for lost books.
- (4) A school district may withhold a transcript from a student who has not paid a legal charge imposed for misuse of school property; it may not withhold a transcript for nonpayment of a fee or charge where the fee or charge was illegal under the laws of this state.
- (5) A school district may require soft-soled shoes for physical education without providing them to all students without charge. It may not require a specific type of shoe or uniform for a physical education course offered for credit where it is unreasonable to expect all students to own the item, unless it provides the item without charge. Indigent students must be provided all required soft-soled shoes without charge upon a showing of the student's inability to provide the shoes on his own.
- (6) A school district may charge for extracurricular activities such as yearbooks and athletic events so long as the charges



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are not made a condition of attendance at the school and are not imposed regardless of the student's participation in the activities.

(7) A school district must provide band instruments without charge if participation in band is given academic credit, but not if band is an extracurricular activity without credit.

(8) A school district may not require a student to provide his own materials for use in constructing or making products or items in classes offered for academic credit. Any product or item made from school-supplied materials becomes the property of the school.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

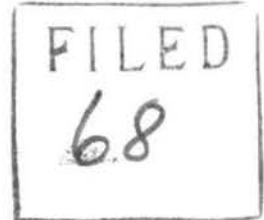
Enclosure: Op. No. 269  
12-1-72, Hill

SCHOOLS:  
TAXATION (SCHOOLS):

The taxpayers of three-director school districts assigned to school districts operating a high school pursuant to Subsection 2 of Section 162.096 shall pay the tax rate effective in the high school district or districts to which the common districts were assigned.

OPINION NO. 68

April 5, 1973



Dr. Arthur L. Mallory  
Commissioner of Education  
State Department of Education  
Jefferson State Office Building  
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This official opinion is issued in response to your request for a ruling on the following question:

"Will the taxpayers of the territory comprising the common school districts be responsible for paying taxes for 1973 at the rate effective in the common school districts at the time of the assignment by the State Board of Education or at a rate approved by the voters of the common school district at a meeting prior to July 1, 1973 or will they be subject to the 1973 tax rate effective in the high school district or districts to which the common district was assigned?"

As you point out in your opinion request, the problem arises due to the provisions of Section 162.096, Subsection 2:

"2. If any school district is not operating [as] a six-director school district and has not combined its territory with that of one or more districts which do operate as a six-director district through one of the procedures provided by law within three years after the effective date of this act, the state board of education shall assign the territory of the district to one or more districts which do operate a high school. The assignments shall be announced not later than January 15, 1973."

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The State Board of Education, at its meeting on December 4-5, 1972, assigned 23 school districts which were not operating as six-director school districts to districts operating a high school. The State Board ordered that the assignments should be effective on July 1, 1973.<sup>1</sup>

Section 164.011, RSMo Cum. Supp. 1971 provides as follows:

"Annual estimate of required funds, tax rate required -- estimates, where sent, when due. -- 1. The school board of each district annually shall prepare an estimate of the amount of money to be raised by taxation for the ensuing school year, the rate required to produce the amount, and the rate necessary to sustain the school or schools of the district for the ensuing school year, to meet principal and interest payments on the bonded debt of the district and to provide the funds to meet other legitimate district purposes. In preparing the estimate the board shall have sole authority in determining what part of the total authorized rate shall be used to provide revenue for each of the funds as authorized by section 165.011, RSMo 1969.

2. The school board of each district under the supervision of the county superintendent shall forward the estimate to the county superintendent on or before the fifteenth day of May. The school board in all other districts shall forward

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Footnote

1. In Subsection 2 of Section 162.096, no effective date for the assignments is given. Assignments provided for in Subsection 1 of Section 162.096 "shall become effective on July 1, 1971." The school year is from July 1 to June 30. Section 160.041, RSMo 1969. Because, under Subsection 1, the legislature indicated its intent that those assignments become effective at the beginning of the school year and because of the obvious convenience in making assignments effective at the beginning of the school year, the State Board of Education's order that the assignments become effective on July 1, 1973, appears correct.

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the estimate to the county clerk on or before the fifteenth day of July. In school districts divided by county lines the estimate shall be forwarded to the proper officer of each county in which any part of the district lies."

Based on the language of Section 162.096 and the action taken by the State Board of Education in conformity therewith, the three-director districts assigned by the State Board of Education on December 4-5 have no expectation of continuing in existence after June 30, 1973. Because the assigned districts will not be in existence for school year 1973-74, no amount of money nor any tax rate is "necessary to sustain the school or schools of the district for the ensuing school year. . . ." Therefore, the school board of a three-director district assigned pursuant to Section 162.096 should not file an estimate for 1973 with either the county superintendent of schools or the county clerk. Because the filing of an estimate is essential to the validity of any school tax levy, no levy by a three-director district would be valid if the estimate is not filed. See *State ex rel. Parish v. Young*, 327 Mo. 909, 38 S.W.2d 1021, 1023 (1931). Presumably, prior to July 15 the receiving six-director district would file with the county clerk, in accordance with Section 164.011, an estimate of the amount of money to be raised by taxation for the ensuing school year and the rate required to produce the amount necessary to sustain the schools of the entire district including the area comprising the old three-director district.

If the assigned three-director districts file no estimate and the receiving districts file estimates reflecting their increased responsibilities for the 1973-74 school year, the entire territory of each six-director district, including the area of the previous three-director district, would pay a uniform tax levy in 1973. Therefore, no problems would arise under the following language of Article X, Section 3:<sup>2</sup>

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Footnote

2. The decision in *Lewis County C-1 School District v. Normile*, 431 S.W.2d 118 (Mo. banc 1968), would not appear to be applicable to this situation. In the *Lewis County* case, the Court stated "we think it is significant that the authority referred to by respondent is district C-1 and that the district did not levy any tax for the year in question." *Id.* at 121. Because the consolidated district had not levied a tax for that year, the Court held that each of the component districts making up the consolidated

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"Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

In the event that the six-director school district's levy is assessed against all property within the district, the taxpayers in the three-director district could be paying a tax in excess of what they would have paid in the three-director district.<sup>3</sup> We do not believe that the lack of an opportunity to vote on the receiving six-director district's levy, even though it is an increase over the rate previously authorized in a three-director district, would constitute a violation of any rights of taxpayers in a three-director district. In Barnes v. Kansas City, 222 S.W.2d 756 (Mo. banc 1949), the Court had before it a challenge by residents of Clay County adjacent to Kansas City, to the attempt by Kansas City to make them pay their proportionate share by taxation to retire municipal bonds approved at an election held prior to their annexation to Kansas City. The area in question was annexed to Kansas City at an election held in 1946, with the annexation to become effective January 1, 1950. On November 4, 1947, the voters of Kansas City approved a municipal bond issue. Plaintiffs in the action contended that the bond

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Footnote

district C-1 should levy its own tax rate and that no violation of Article X, Section 3 resulted. In the instant case a different situation exists because the receiving six-director district would levy a tax on property within its boundaries and, if a different tax rate was levied upon property within the boundaries of the old three-director district, the same class of property within the district would be taxed at a different rate in one part of the district than in another thereby violating Article X, Section 3.

3. For the purposes of this discussion, we will assume that the tax rate in the receiving six-director district is in excess of that previously levied by the three-director district. Because the 1972 tax rate in the three-director district could have been levied in 1973 by the three-director district without a vote pursuant to the provisions of Section 11(c) of Article X, the receiving six-director district could levy up to that amount without reaching any of the potential problems resulting from lack of voter approval which are discussed herein.

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issue was invalid as to them because they were not permitted to vote in the bond election. Id. at 758.

Initially, the Court determined that plaintiffs were not qualified electors of Kansas City at the time of the bond election and so were not eligible to vote on the bond issue. Id. at 758.

The Court then noted that there was no provision in the Missouri Constitution governing the adjustment of pre-existing rights and liabilities when a city changes its boundaries. Plaintiffs argued that because the Constitution was silent on this question and because the legislature had not made a provision for the adjustment of pre-existing rights and liabilities, the bond issue could not be imposed upon them. The Court disagreed, referring to the general rule that:

" . . . property brought within the corporate limits of a city by annexation is subject to taxation to discharge municipal indebtedness previously incurred and existing at the time of annexation. . . ."  
Id. at 758.

Relying on this general rule, the Court held that the taxpayers living in the annexed area were liable for paying taxes to retire liabilities of Kansas City upon which they did not vote.

" . . . when the statutes are silent, the general rule will apply. . . .

"This court considered the same question as to school districts in *Thompson v. Abbot et al.*, 61 Mo. 176. There, school subdistrict No. 3 was dissolved and its territorial limits merged with the city of Springfield for school purposes. Such annexation was authorized by statute, but the statute was silent as to the liability for the debts of the merged district. We held the city became liable for such debts by operation of law. We said where no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the subsisting corporation will be entitled to all the property, and be answerable for all the liabilities. We may apply the same reasoning in this case. Accordingly, the annexed area will become liable for its proportionate share of the liabilities of Kansas City by operation of law when the annexation



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becomes effective. We hold there is no need for express statutory authority in order to impose such liability upon the annexed area. Town of Mt. Pleasant v. Beckwith, 100 U.S. 514, 25 L.ed. 99." Id. at 759.

We do not see any essential difference between paying taxes to retire bonded debt and paying taxes to support a school system. Furthermore, we see no essential difference between (1) the annexation in Barnes where the people in Clay County had no vote on either the annexation question or the paying of taxes to retire previously authorized debt and (2) the annexation of a three-director district to a six-director district where people in the three-director district had no vote on either annexation or on the tax rate in the receiving district. In both instances, taxpayers in the annexed area benefit from their taxes. In the instant case, the 1973 taxes paid by the residents of the former three-director districts will be used to operate the schools of the six-director districts of which they are a part for school year 1973-74 beginning on July 1, 1973, the effective date of the State Board of Education's annexation order.

The Court in Barnes then called attention to plaintiff's contention that imposing liability for pre-existing debts on the annexed area violated both the Missouri and United States Constitutions. Although plaintiffs cited no authority to sustain their positions, the Court noted that "the cases we find subjecting annexed areas to city taxes lead to the opposite conclusion." Id. at 760.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution does not afford protection from increased taxation resulting from annexation of an area to a municipal corporation. See Hunter v. City of Pittsburgh, 207 U.S. 161 (1907). See, also Gomillion v. Lightfoot, 364 U.S. 339 (1960) where the Supreme Court said:

"[I]f one principal clearly emerges from the numerous decisions of this court dealing with taxation it is that the Due Process Clause affords no immunity against mere inequalities in tax burdens, nor does it afford protection against their increase as an indirect consequence of a State's exercise of its political powers." Id. at 343.

See, also, Adams v. City of Colorado Springs, 308 F.Supp. 1937 (D.Colo. 1970), aff'd, 399 U.S. 901 (1970).



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If a three-director school district files an estimate prior to July 1, 1973, the six-director district should withdraw said estimate before it is acted upon by the county clerk. At the time the three-director district's estimate is withdrawn, the receiving district should make certain it has on file an estimate reflecting its increased responsibilities for school year 1973-74. The receiving district's estimate should be clearly applicable to the entire territory of the six-director district including the territory of the annexed three-director district. If such an estimate is not already on file at the time the three-director district's estimate is withdrawn, the receiving district should file a revised estimate at that time. A valid levy may be made upon the revised estimate. Lyons v. School District, 311 Mo. 349, 278 S.W. 74, 78 (1925); Pope v. Lockhart, 252 S.W. 375, 376 (Mo. 1923), and State ex rel. Thorp v. Phipps, 148 Mo. 31, 49 S.W. 865, 867 (1899).

We believe the conclusion of this opinion is not inconsistent with the recent decision of the Missouri Court of Appeals, Kansas City District, in State of Missouri ex rel. Ft. Osage School District v. Bernice Conley, 485 S.W.2d 469 (1972). The Court concluded that the levy authorized by the Courtney School District prior to annexation was an asset available to the Ft. Osage District after the annexation was complete. See Section 162.441. The Court specifically stated that it did not reach "the question of the propriety of action by the surviving six (6) director district attempting to enforce a voter approved levy upon annexed territory without a vote of the people in the newly annexed territory." Id. at 472. Also, the Court did not discuss whether the receiving district could withdraw an estimate filed by the three-director district.

#### CONCLUSION

Therefore, it is the conclusion of this office that the taxpayers of three-director school districts assigned to school districts operating a high school pursuant to Subsection 2 of Section 162.096 shall pay the tax rate effective in the high school district or districts to which the common districts were assigned.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,



John C. Danforth  
Attorney General

March 13, 1973

OPINION LETTER NO. 69  
Answer by letter-Wood



Mr. Joseph Jaeger, Jr.  
Director of Parks  
State Park Board  
Post Office Box 176  
Jefferson City, Missouri 65101

Dear Mr. Jaeger:

This is in response to your question as to whether the State Park Board has the authority to restrict the political activities of its employees along the lines set forth in the Board's Administrative Memorandum No. 8 dated January 1, 1967. This memorandum, in its entirety, is here set out with emphasis on the portion restricting activity.

"The declared policy of the Missouri State Park Board with regard to political activities of the Missouri State Park Board employees is as follows:

The employees of the Missouri State Park Board are free to think and vote as they please politically. They cannot hold any political office or serve as committeemen or in any other capacity with political organizations. The people of the State expect this department to be on a nonpolitical, impartial basis and we expect our employees to act so that this expectation may be fulfilled.

"The status of no employee of the Missouri State Park Board shall be affected in any way either by his contribution to any party's campaign

Mr. Joseph Jaeger, Jr.

fund or his failure to so contribute. Employees are free to make their decisions as to contributions to campaign funds.

"The employees of the Missouri State Park Board are under no political obligations so far as employment or tenure is concerned, and their employment shall be retained on the basis of satisfactory service or conduct."

The statutory powers of the Park Board include the authority to employ a director and such other officers and employees as it may deem necessary, to determine their qualifications and compensation and to prescribe their duties. Section 253.060, RSMo. The Board may also make and promulgate all reasonable rules and regulations germane to its purposes, including rules relating to its organization and internal management. Section 253.035, RSMo.

We believe that Administrative Memorandum No. 8 is a proper exercise of these delegated statutory powers provided it does not infringe upon the constitutionally protected civil rights of the employees. First Amendment, United States Constitution; Article I, §§ 8 and 9, Missouri Constitution. In passing upon an Oklahoma statute of similar purport to Administrative Memorandum No. 8, a federal court in that jurisdiction stated:

"We conclude that the Oklahoma Legislature has the power to regulate, within reasonable limits, the political conduct of state employees in order to promote efficiency and integrity in the public service. . . .

"We conclude that the constitutional guarantees of free speech and association are not absolutes and this Court must balance the extent of these freedoms against a legislative enactment designed as a safeguard against the evils of political partisanship by state employees. . . .

"We find that a government's interest in avoiding the danger of having promotions and discharges of civil servants motivated by political ramifications rather than merit is highly desirable. This interest is of such an importance that it may properly be classified as a compelling governmental interest, and a showing of a compelling governmental

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interest is sufficient to justify some encroachment upon an individual's first amendment rights. . . .

"We find that the provisions of unnumbered paragraphs six and seven of Title 74 O.S.1971, § 818, prohibiting political activity by state employees, are directly related to the State's goal of prohibiting partisan political activity. Said provisions allow state employees to participate in political decisions at the ballot box and prohibit only the partisan activity that would threaten efficiency and integrity and does not restrict public and private expressions on public affairs and personalities so long as the employee does not channel his activity towards party success. These prohibitions do not unduly infringe upon protected rights under the First Amendment to the United States Constitution. . . ." Broadrick v. State of Oklahoma ex rel. Oklahoma State Personnel Board, 338 F.Supp. 711, 715-716 (W.D. Okla. 1972) (prob. juris. noted 34 L.Ed.2d 510, December 11, 1972)

The constitutionality of the Federal Hatch Act has been sustained by the United States Supreme Court. United Public Workers v. Mitchell, 330 U.S. 75 (1947); Oklahoma v. United States Civil Service Commission, 330 U.S. 127 (1947). The current validity of these decisions has been challenged by some lower federal courts (e.g., Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971)), but until they are overruled by the Supreme Court we consider them binding precedent. Recently, a federal court in the District of Columbia declared invalid that portion of the Hatch Act adopting as the standard of prohibited political conduct all rulings of the Civil Service Commission antedating passage of the Act (1940). National Association of Letter Carriers, AFL-CIO v. United States Civil Service Commission, 346 F.Supp. 578 (D.C. 1972) (prob. juris. noted 34 L.Ed.2d 510, December 11, 1972). In so doing, however, the court recognized the validity of the essential purpose of the Act to restrict political activity by government employees:

"There is an obvious, well-established governmental interest in restricting political activities by federal employees which was asserted long before enactment of the Hatch Act. Many federal employees have been prevented from running for political office and engaging

Mr. Joseph Jaeger, Jr.

in the more obvious forms of partisan political activity since the passage of the Civil Service Act in 1883.

"The Hatch Act provides in pertinent part that any employee of an Executive agency or an employee of the District of Columbia may not take an active part in political management or political campaigns of a partisan nature and is subject to removal or suspension without pay for violation. The appropriateness of this governmental objective was recognized by the Supreme Court of the United States when it endorsed the objectives of the Hatch Act.

\* \* \*

". . . Government employment should, of course, carry some well-defined limitations upon participation in partisan political matters, but Congress may not by reason of this desirable objective neutralize such a large segment of the populace from expressing any opinion of any 'political' issue with the intent of somehow influencing someone else. In the end everything may appear political, all speech may intend to influence, and conformity is imposed in the fashion of more regimented, less democratic governments." 346 F.Supp. at 579-580, 583-584

In our opinion, Administrative Memorandum No. 8 of the Missouri State Park Board does not exceed the permissible scope of governmental restriction on the political activities of its employees. We, therefore, believe that the Park Board is authorized to limit its employees' political activities in the manner described in the memorandum.

Yours very truly,

JOHN C. DANFORTH  
Attorney General



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

January 23, 1973

OPINION LETTER NO. 71

Honorable Walter H. Mueller, Jr.  
State Representative, District 93  
Room 101D, State Capitol Building  
Jefferson City, Missouri 65101

Dear Representative Mueller:

This letter is in response to your request for an opinion which we understand asks whether a city of the fourth class can pay for repairs for an entrance into a subdivision of the city when the entrance is outside the city limits in an unincorporated area of a first class county.

Section 71.340, RSMo, provides:

"The mayor and city council of any city or the chairman and board of trustees of any incorporated town or village shall have the power to annually appropriate and pay out of the treasury of such city or incorporated town or village a sum of money, not to exceed ten percent of the annual general revenue thereof, for the purpose of constructing, building, repairing, working, grading or macadamizing any public road, street and highway and any bridge thereon leading to and from such city or incorporated town or village; and such appropriation shall be made by ordinance and the money so appropriated shall be applied under the supervision and direction of the engineers of such city or incorporated town or village, and of the county highway engineer of the county in which such city, town or village is located, or of some competent person selected by such

Honorable Walter H. Mueller, Jr.

city, town or village and approved by the county highway engineer, who shall make a report thereof, in writing, to the mayor and city council of such city, or to the chairman and board of trustees of such incorporated town or village; but this privilege shall not extend to a greater distance than five miles from the corporate limits of such city, town or village, and shall not be construed so as to allow any obstruction to or interference with the free use of any such public road, street or highway by the public, except so far as may be necessary while such work is being done, and further shall not be construed to affect the liability of such city, town or village, which liability shall be the same as if such roads, streets and highways were inside the city limits."

We believe this section answers your question.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH  
Attorney General



SCHOOLS:

CONSTITUTIONAL LAW:

A person between his sixteenth and twenty-first birthdays has a right to attend public school in the district of his residence on a part-time basis, and to take any course which he would be entitled to take were he a full-time student. This right may not be denied because the person also attends a private parochial school. A school district has a duty to accept such a student. A school district may make such reasonable rules and regulations governing part-time students as will preserve the discipline, health, and academic standards of the school, but these rules may not be such as to place an unreasonable burden on part-time attendance.

OPINION NO. 73

March 14, 1973

Honorable Ray S. James  
Representative, District 31  
Room 202H, Capitol Building  
Jefferson City, Missouri 65101



Dear Representative James:

This official opinion is in response to your request for a ruling on the following questions:

"Does a person who is age 16, and therefore not subject to the Compulsory Attendance Law, Section 167.031, RSMo 1969, who is enrolled in, and attending, a private parochial school, have a right to attend part time (i.e. a limited number of classes of the general curriculum such as world literature, chemistry, physics, radio speaking, dramatics, foreign languages, etc.) the public school within the district of the person's residence? If the person has such a right do the public school authorities have a duty to enroll the person as a part time student (i.e. to attend a limited number of classes) subject to needful rules and regulations to insure the orderly conduct of the school? If the public school authorities have such a duty is the authority of the school board to issue needful rules and regulations limited to reasonable requirements for academic standards, health, discipline and other requirements to insure the orderly conduct of the school which do not

Honorable Ray S. James

arbitrarily deprive a person the opportunity of part time attendance?"

In effect, each of these questions is the same. If the first question is answered in the affirmative, that is, if a student has a right to attend public school part-time, then the other questions are answered as well: the school will have a duty to accept him, and the school may not avoid that duty by imposing unreasonable rules and regulations which frustrate the student's right. Conversely, if we determine that there is no right to part-time attendance, then the school has no duty to enroll part-time students, and the rules and regulations which the school imposes matter little.

The legal issues raised by your questions have been answered in our Opinion No. 133, 1971, copy enclosed, and we refer you to that opinion for a full discussion of these issues. In that opinion we ruled that a person between his sixteenth and twenty-first birthdays is entitled, as a matter of Missouri constitutional law, to attend a public school in his district on a part-time basis if he desires. We further determined that such part-time attendance could not be denied a student on the grounds that he also attended a parochial school.

Opinion No. 133, 1971, dealt specifically with vocational schools, and you tell us that it has been interpreted as applying only to vocational education. We believe, however, that the principles expressed in Opinion No. 133, 1971, are not limited to vocational education, but rather, they extend to all subjects taught in our public schools. An examination of the opinion will reveal that the constitutional issues involved are the same whether the subject taught is mechanical arts or plane geometry, as long as the course is being taught in a public school by a public teacher to all students on the same basis.

In implementing its duty to accept part-time students, a school district may establish reasonable rules and regulations to insure the orderly operation of the school, but it may not make the rules in such a way that the right of students to attend part-time is impaired. For instance, a rule which keeps students out of the halls except between classes might be proper, but a rule preventing students from entering or leaving the building during the school day would be unacceptable, at least as it applies to part-time students. (Nothing here should be taken to deny a school district's power to keep unauthorized persons out of its buildings or to require proper identification of all students.) For a fuller discussion of the reasonableness of rules, see Opinion No. 133, 1971, at pages 6-8.

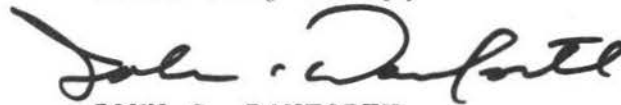
Honorable Ray S. James

CONCLUSION

Therefore, it is the opinion of this office that a person between his sixteenth and twenty-first birthdays has a right to attend public school in the district of his residence on a part-time basis, and to take any course which he would be entitled to take were he a full-time student. This right may not be denied because the person also attends a private parochial school. A school district has a duty to accept such a student. A school district may make such reasonable rules and regulations governing part-time students as will preserve the discipline, health, and academic standards of the school, but these rules may not be such as to place an unreasonable burden on part-time attendance.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 133  
10-28-71, Jasper

March 20, 1973

OPINION LETTER NO. 74  
Answer by letter-Vodra

Honorable Cloy E. Whitney  
Representative, District 2  
Room 202D, Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Whitney:

This opinion is in response to your request for a ruling on the following question:

"Is Section 171.011 of the Missouri school laws, relating to grading of students, in violation of the U.S. Constitution under the 14th amendment because of discrimination of public school students due to the lack of a fair and equal standard guideline for grading in the State of Missouri?"

Based on the facts you provide, we understand your primary concern to be that "grades are frequently determined by social status, sex, race, [or] color," or by other factors irrelevant to the quality of a student's work.

Section 171.011, RSMo 1969, reads as follows:

"The school board of each school district in the state may make all needful rules and regulations for the organization, grading and government in the school district. The rules shall take effect when a copy of the rules, duly signed by order of the board, is deposited with the district clerk. The district clerk shall transmit forthwith a copy of the rules to the teachers employed in the schools. The rules may be amended or repealed in like manner."

Honorable Cloy E. Whitney

Section 171.011 is one part of the general statutory scheme which transfers the day-to-day operation of Missouri schools to local school boards. The choice of leaving student evaluation methods to local schools where any problems can be easily resolved and where flexibility can be retained is a legislative decision which is not without a rational basis and which the General Assembly could reasonably make. The legislature did more than merely delegate the grading power, however; procedures are set down for the promulgation of "all needful rules and regulations" and for the filing of those rules. Thus, the legislature has authorized a grading system; it has not authorized arbitrary action.

Because we believe that both the substance and procedure contained in Section 171.011 bear a rational relation to a legitimate state interest, we do not find the section on its face to be in violation of the Fourteenth Amendment to the United States Constitution.

The validity of any particular grading system is a determination beyond the competence of this office. A grading system must be reasonable within the goals of a school district, but many factors which differ between districts could make a particular grading system more appropriate in one place than in another. Decisions as to the validity of such a system are best left to persons with educational expertise, and any challenge should be made in a judicial proceeding where all viewpoints could be fairly considered.

However, if a school district or one of its employees uses a grading system as a vehicle for discrimination against any person because of the person's race, creed, sex or social status, then there is a violation of that person's constitutional rights. Just as a school district cannot discriminate in school attendance on account of race, Brown v. Board of Education of Topeka, 347 U.S. 483 (1954); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), neither can they discriminate in the way they treat students within the classroom. Hobson v. Hansen, 269 F.Supp. 401 (D.D.C. 1967), aff'd and modified sub nom Smuck v. Hobson, 408 F.2d 175 (D.C.Cir. 1969). Nothing in Section 171.011 permits such discrimination.

Thus in short, we believe that Section 171.011, RSMo 1969, is valid on its face, but that any attempt to discriminate against a student in grading because of the student's race, creed, sex or social status would be a violation of the Fourteenth Amendment to the United States Constitution.

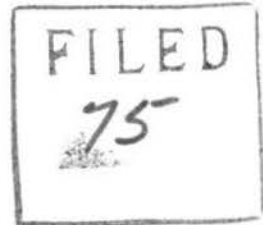
Yours very truly,

JOHN C. DANFORTH  
Attorney General

March 14, 1973

OPINION LETTER NO. 75  
Answer by Letter - Klaffenbach

Honorable Ralph Uthlaut, Jr.  
Missouri Senate, 23rd District  
Room 424 State Capitol Building  
Jefferson City, Missouri 65101



Dear Senator Uthlaut:

This letter is in response to your opinion request in which you ask the following questions:

"The County Court of Gasconade County, Missouri, by its order dated August 30, 1971, effective August 31, 1971, ordered the dissolution of the Owensville Area Hospital District according to the provisions of 206.120.

"This section provides that upon dissolution 'any funds remaining on hand and belonging to the district shall forthwith be paid pro-rata to those taxpayers from whom they were collected.

1. What disposition can or should be made of the funds of a deceased taxpayer who left no estate or whose estate has been closed?

2. What disposition can or should be made of the funds of taxpayers who cannot be located and whose addresses are unknown after diligent efforts to determine the same?

3. Does the County Collector have the authority to return delinquent hospital tax funds received from taxpayers after the effective date of the dissolution, without any further proceedings?"



Honorable Ralph Uthlaut, Jr.

Subsection 3 of Section 206.120, RSMo, to which you refer, provides:

"If less than the required majority of the votes cast are for the first loan submitted to the voters following the organization of the district, a second authorized proposition for authority to borrow money may be submitted and if unsuccessful a third election may be held. If each of the first three propositions submitted to the voters for authority to borrow money for the purposes of this section is defeated, or if no successful election for such purpose is conducted within five years after the establishment of the district, then the district shall be immediately dissolved by order of the county court establishing it, and any funds remaining on hand and belonging to the district shall forthwith be paid pro rata to those taxpayers from whom they were collected; provided that in any district wherein a hospital is in operation without having voted bonds, the provisions of this section as relating to dissolution shall not apply." (Emphasis added)

The underscored provisions were added by the amended laws of 1967. Similar provisions are contained in Section 198.360, RSMo Supp. 1971, relating to nursing home districts, added by the amended laws of 1969. We find no court decisions or statutes precisely applicable to your first two questions respecting distribution of such assets when the persons are deceased and no executor or administrator comes forward to make a claim or where the taxpayer cannot be located. However, we believe your questions one and two are answered by the enclosed opinion, No. 203, dated February 27, 1968 to Schechter, and the earlier opinions, No. 6, dated October 31, 1941 to Bell. That is, we believe that the common law compels an escheat to the State of Missouri of such unclaimed funds. Obviously, the situation is one which should be clarified by legislation. Compare Section 202.060, RSMo. We point out, however, that it is our view that an attempt should be made to notify the heirs of such taxpayers of the fact that such money may be claimed prior to an escheat.

In response to your third question concerning whether the county collector has the authority to return delinquent hospital tax funds to such taxpayers, our answer is clearly "no".



Honorable Ralph Uthlaut, Jr.

The collector is only a conduit, so to speak, and he has no authority to make a distribution to taxpayers because of the dissolution of the district.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 203  
2/27/68, Schechter

Op. No. 6  
10/31/41, Bell

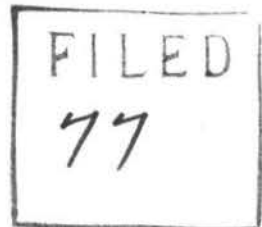
COOPERATIVE AGREEMENTS:  
MOTOR VEHICLES:  
LICENSES:  
FEE AGENTS:

The county and city governments of the State of Missouri cannot be appointed by the Director of Revenue as Department of Revenue fee office agents to perform those duties set out in Section 136.055, RSMo 1969, because said duties are not within the scope of the powers of city or county governments in this state.

OPINION NO. 77

February 21, 1973

Mr. James R. Spradling  
Director, Department of Revenue  
Jefferson State Office Building  
Jefferson City, Missouri 65101



Dear Mr. Spradling:

This official opinion is in response to your request for an opinion from the Office of the Attorney General concerning the following question:

"Can the county or city governments of Missouri act as fee agents for the State of Missouri for the sale of motor vehicle licenses, and the collection of motor vehicle sales and use tax?"

The Legislature for the State of Missouri has authorized the state Director of Revenue to appoint agents whose duties include the sale of motor vehicle licenses and the collection of motor vehicle sales and use taxes. The pertinent statute in this regard is Section 136.055, RSMo 1969, which follows:

"1. Any person who is selected or appointed by the state director of revenue to act as an agent of the department of revenue, whose duties shall be the sale of motor vehicle licenses and the collection of motor vehicle sales and use taxes under the provisions of section 144.440, RSMo, and who receives no salary from the department of revenue shall be authorized to collect from the party requiring such services additional fees as compensation in full for all services rendered on the following basis:

Mr. James R. Spradling

(1) For each motor vehicle or trailer license sold, renewed or transferred--forty cents;

(2) For each application or transfer of title--forty cents;

(3) For each chauffeur's, operator's or driver's license--forty cents;

(4) No notary fee or other fee or additional charge shall be paid or collected.

"2. This section shall not apply to agents appointed by the state director of revenue in any city where the department of revenue maintains an office."

Although the statute authorizes the Director of Revenue to appoint "any person", the authority to appoint a city or county as agent to perform such functions is not prohibited by the use of the term "person". Section 1.020(7) provides that "[t]he word 'person' may extend and be applied to bodies politic and corporate, and to partnerships and other unincorporated associations." A "body politic" has been defined as ". . . a social compact by which the whole people covenant with each other, and each citizen with the whole people, that all shall be governed by certain laws for the common good." Munn v. Illinois, 94 U.S. 113, 124, 24 L.Ed. 77, (1876). The term "bodies politic and corporate" has been found applicable to both counties and municipalities. Spencer v. Sully County, 33 N.W. 97, 4 Dak. 474 (1887); Uricich v. Kolesar, 5 N.E.2d 335, 337, 132 Ohio St. 115 (1936); Middle States Utilities Co. v. City of Osceola, 1 N.W.2d 643, 645, 231 Iowa 462 (1942); and City of Bowling Green v. Bd. of Ed. of Bowling Green Ind. School Dist., 443 S.W.2d 243, 245 (Ky. 1969). Therefore, by substitution, Section 136.055 can be read as follows:

"Any [body politic and corporate, to include any city or county of the State of Missouri, partnership, or other unincorporated association] who is selected or appointed by the state director of revenue to act as an agent of the department of revenue, . . ."

Therefore, there is nothing in Section 136.055 which would preclude the Director of the Department of Revenue from appointing cities or counties as Department of Revenue fee office agents. However, it must be determined whether, upon the appointment of

Mr. James R. Spradling

a city or a county as a Department of Revenue fee office agent, such political entity would have the authority to perform the duties of "the sale of motor vehicle licenses and the collection of motor vehicle sales and use taxes. . . ."

Political subdivisions of the State of Missouri have been given the statutory authority to enter into contracts with other public bodies, usually designated as cooperative agreements, whereby services common to both contracting entities may be performed by one such entity. Section 70.220, RSMo 1969, is the statute granting such authority and provides that:

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides." (Emphasis added)

The term "political subdivision" as defined by Section 70.210(2) includes "counties, townships, cities, towns. . . ." Please note that the legislature has expressly granted political subdivisions the authority to enter into cooperative agreements with agencies of the State of Missouri. This would authorize cities and counties to contract with the Department of Revenue to perform fee agent services

". . . provided, that the subject and purposes of any such contract or cooperative

Mr. James R. Spradling

action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. . . ."

Counties, cities and public officials derive their authority from the state and have only such authority as expressly given them by law and that which is necessarily implied in order to execute that which is expressly given. Lancaster v. Atchison County, 352 Mo. 1039, 180 S.W.2d 706 (Banc 1944). We have concluded that the performance of the duties of Department of Revenue fee office agents cannot be accomplished under present statutory law, by political subdivisions, because certain of those duties are without the scope of the powers of either cities or counties of this state. The power to issue driver's and chauffeur's licenses is nowhere conferred upon either counties or municipalities by the statutes of this state. Additionally, the power to do so cannot be reasonably implied from the various expressly enumerated powers of counties and municipalities. Presently, Department of Revenue fee office agents have the duty, by reason of Section 136.055, to collect motor vehicle sales and use taxes. This duty is not within the scope of the powers of any political subdivision of this state. Counties, no matter what their class, are given no express power to tax the sale or use of motor vehicles. Cities with a population of at least five hundred, on the other hand, do have the authority to impose sales taxes, with the approval of a majority of the voters of such cities, upon the purchase of, among other things, motor vehicles. Section 94.510, RSMo 1969. However, Section 94.560 expressly precludes a city from actually collecting the sales tax imposed upon motor vehicles. That statute provides as follows:

"City sales taxes imposed pursuant to sections 94.500 to 94.570 on the purchase and sale of motor vehicles shall not be collected and remitted by the seller, but shall be collected by the director of revenue at the time application is made for a certificate of title, if the address of the applicant is within a city imposing a city sales tax. The amounts so collected shall be deposited in the city sales tax trust fund to the credit of the proper cities less the two percent collection cost."

Although there is nothing in Section 136.055, authorizing the Director of Revenue to appoint fee office agents, which would preclude the Director from appointing political subdivisions as agents, the cities and counties of this state can perform a service in common with another public body only via the execution

Mr. James R. Spradling

of a cooperative agreement pursuant to Section 70.220, and may only enter into such an agreement where the service to be performed is otherwise within the scope of the powers of the contracting political subdivisions. In that certain of the duties presently performed by the Department of Revenue fee office agencies are not expressly or impliedly within the power of political subdivisions, we must conclude that neither municipalities nor counties can be appointed as Department of Revenue fee office agents under the present statutes of this state.

#### CONCLUSION

Therefore, it is the opinion of this office that the county and city governments of the State of Missouri cannot be appointed by the Director of Revenue as Department of Revenue fee office agents to perform those duties set out in Section 136.055, RSMo 1969, because said duties are not within the scope of the powers of city or county governments in this state.

This opinion, which I hereby approve, was prepared by my assistant Michael L. Boicourt.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General





OFFICES OF THE

**ATTORNEY GENERAL OF MISSOURI**

**JEFFERSON CITY**

JOHN C. DANFORTH  
ATTORNEY GENERAL

January 23, 1973



Honorable William A. Peterson  
Representative, District 117  
503 East Eastwood  
Marshall, Missouri 65340

Dear Representative Peterson:

This letter is in response to your communication of January 18, 1973 concerning the "Missouri Institute of Psychiatry" and the "Psychiatric Research Foundation of Missouri".

The status of the former is best exemplified by the summary found in the Missouri Institute of Psychiatry, Bulletin 1967-1969, p 4, which states:

"The urgent need to expand and intensify research efforts in mental health in Missouri, as elsewhere across the country, led to the founding in 1962 of the Missouri Institute of Psychiatry in St. Louis. At first a part of the Missouri Division of Mental Health, MIP since 1965 has been a full Department of Psychiatry of the University of Missouri School of Medicine. Its fundamental objectives have always been to conduct research and to train mental health professionals. It has become a leading center for research in mental illness, especially for those types with problems of concern to public mental health programs.

A close working relationship between a major university and a state department of mental health furthers the Institute's goals, since it can offer the attraction of a University appointment and at the



same time provide ready access to a wealth of patient material...a rare combination indeed. Any consenting patient in the Division's 10 major and 10 smaller institutions may be brought into the Institute's research environment, thus setting the stage for progress in finding answers to the etiology and treatment of major mental illness. Several factors insure the smooth operation of the dual-functioning program:

Key members of the Department of Psychiatry at MIP play important roles in the Missouri Division of Mental Health; the Institute is housed on the grounds of St. Louis State Hospital, the Division's largest hospital; much of the Institute's financial support comes from the Division either through direct grant supporting programs or direct provision of services; and, finally, benefit occurs to the Division's patients while the institute's research and training objectives are being met.

MIP's research efforts focus on developing better instruments and techniques for treating the mentally ill and on critically evaluating new and existing techniques."

Apparently it was with these goals in mind that the legislature has annually appropriated sums to the Missouri Division of Mental Health to continue effective cooperation with the University of Missouri in the Missouri Institute of Psychiatry program. (See for example, H.B. 1005, Sec. 5245, 76th General Assembly, Second Regular Session; H.B. 5, Sec. 5.450, 75th General Assembly; H.B. 5, Sec. 5.410, 74th General Assembly; H.B. 5, Sec. 5.310, 73rd General Assembly; H.B. 5, Sec. 5.240, 72nd General Assembly)

The pro forma corporation of which you speak, the Psychiatric Research Foundation of Missouri is not a part of the Division of Mental Health and not a part of the University of Missouri. It does not appear to receive or use any state funds and we understand that it's personnel consists only of Dr. Warren A. Thompson who is a full time staff member of the University of Missouri and who is located at the Kohler Building, St. Louis State Hospital, St. Louis, Missouri.

Honorable William A. Peterson  
Page 3

(See Official Manual 1971-72, p. 595) The Psychiatric Research Foundation is a nonprofit organization which is closely geared to the demands of the mental health community.

In sum, we find nothing in the record which suggests any impropriety and nothing which would warrant further investigation. The complexities of these organizations suggest only a cooperative effort on the part of state government to function effectively in the mental health area.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large, sweeping initial "J" and a long, horizontal stroke extending to the right.

JOHN C. DANFORTH  
Attorney General



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

January 30, 1973

OPINION LETTER NO. 80

Honorable Donald L. Manford  
State Senator  
Room 425, Capitol Building  
Jefferson City, Missouri

Dear Senator Manford:

This is in response to your request for an opinion concerning the rights of way of various automobiles under different circumstances on public thoroughfares in this state. The various circumstances involved have been outlined in careful detail by a constituent of yours in a letter which accompanied this request.

The general traffic regulations of this state are contained in Chapter 304, RSMo 1969 as amended. Sections 304.341 and 304.351, RSMo 1969, set forth in specific detail the rights and responsibilities of drivers of vehicles at intersections.

In our view the traffic regulations contained in Chapter 304 are broad enough to cover any situation which might arise on the public thoroughfares of our state and sufficiently clear to enable any driver to determine his rights and responsibilities. Therefore, we make no attempt to analyze the specific hypothetical situations set forth by your constituent or enunciate the rights and responsibilities of each hypothetical driver.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH  
Attorney General



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

February 13, 1973

OPINION LETTER NO. 81

Mr. James B. Boillot  
Commissioner of Agriculture  
Department of Agriculture  
Post Office Box 630  
Jefferson City, Missouri 65101

Dear Mr. Boillot:

This is in response to your request for an opinion as to whether all or any part of the statutory authority vested in the Commissioner of Agriculture can be delegated to an autonomous body, the members of which are appointed by the Commissioner or the Governor, or a body which is under the direction and control of the Commissioner.

The principle to be followed in determining whether or not the Commissioner of Agriculture can delegate his statutory duties was set forth by the Missouri Supreme Court in *State ex rel Skrainka Construction Company v. Reber*, 126 S.W. 397, 399 (Mo. 1910):

"... An officer to whom a discretion is intrusted by law cannot delegate to another the exercise of that discretion, but after he has himself exercised the discretion he may, under proper conditions, delegate to another the performance of a ministerial act to evidence the result of his own exercise of the discretion.  
..."

The legislature has seen fit to designate the Commissioner of Agriculture as the official in charge of the State Department of Agriculture, with full power to supervise the State Fair and all of the legalized departments of the state which are of a regulatory nature for the advancement of horticulture and agriculture. Sections 261.010 and 261.020, RSMo 1969. In order to carry out his

Mr. James B. Boillot

duties, the Commissioner has the power to appoint all employees necessary at salaries fixed by law for the administration of laws under his charge. Section 261.040, RSMo 1969.

Proper administration of the duties placed upon the Commissioner by statute would necessarily involve the exercise of discretion on his part. This being so, it is our opinion that the Commissioner of Agriculture cannot delegate any of his statutory duties to an autonomous body composed of members appointed by either the Commissioner or the Governor. However, the appointment of a body to serve at the pleasure and under the direction of the Commissioner, said body to assist the Commissioner in carrying out his statutory duties and not to replace him, is a matter of internal organization only.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

February 13, 1973

OPINION LETTER NO. 82

Mr. James B. Boillot  
Commissioner of Agriculture  
Department of Agriculture  
Post Office Box 630  
Jefferson City, Missouri 65101

Dear Mr. Boillot:

This is in response to your request for a legal opinion as to the authority of the Commissioner of Agriculture to reorganize the internal structure of the Department of Agriculture in a manner which in the judgment of the Commission would enable the Department of Agriculture to better perform its statutory duties. It is our understanding that this reorganization does not purport to be a delegation of the Commissioner's statutory duties to "assistants" or "deputies," but rather a reorganization of the staff of the Missouri Department of Agriculture which operates under the Commissioner's direction and control.

The legislature has placed the Commissioner in charge of the Department of Agriculture. Section 261.010, RSMo 1969. The Commissioner has been authorized to appoint all employees necessary at salaries fixed by law for the administration of all laws under his charge as a consolidated department conducted on an economical business basis. Section 261.040, RSMo 1969. This grant of power is sufficient to enable the Commissioner to organize the Department of Agriculture in the manner he feels would best enable the Department to carry out the duties imposed upon it by law.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

CRIMINAL LAW:  
MINORS:  
PHYSICIANS:

The General Assembly has not as yet enacted any law prohibiting licensed physicians from prescribing contraceptive medications and devices to persons under the age of twenty-one who have not been emancipated by marriage or other means without obtaining the consent of such person's parents.

OPINION NO. 84

March 9, 1973

Honorable Clifford B. Mayberry  
Prosecuting Attorney  
Adair County  
213 West Washington  
Kirksville, Missouri 63501



Dear Mr. Mayberry:

You have asked whether any criminal statute of Missouri prohibits physicians from prescribing contraceptive medications and devices to persons under the age of twenty-one without parental consent where such minors have not been emancipated by marriage or other means.

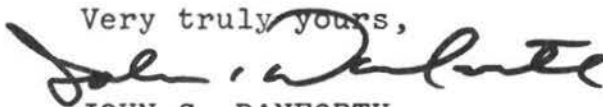
The General Assembly has not enacted as of this time any statute explicitly subjecting physicians to criminal liability for prescribing contraceptive medications and devices to minors. Nor is Section 559.360, RSMo 1969, relating to contributing to the delinquency of minors, applicable. In Eisenstadt v. Baird, 405 U.S. 438 (1971), the Supreme Court of the United States held that laws prohibiting the distribution of contraceptives bear no rational relationship to the enforcement of laws protecting the public morals, and cannot be applied for such purposes.

#### CONCLUSION

Therefore, it is the opinion of this office that the General Assembly has not as yet enacted any law prohibiting licensed physicians from prescribing contraceptive medications and devices to persons under the age of twenty-one who have not been emancipated by marriage or other means without obtaining the consent of such person's parents.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Very truly yours,

  
JOHN C. DANFORTH  
Attorney General



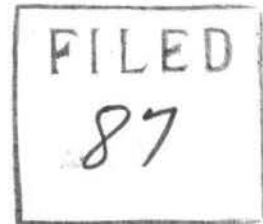
COUNTY HEALTH CENTERS:  
COUNTY COURT:  
COUNTIES:  
HEALTH:  
RABIES:  
ANIMALS:

The board of trustees of the county health center in a county of class two which adjoins a county of the first class having a charter form of government cannot authorize the expenditure of county health center funds for rabies control.

OPINION NO. 87

February 16, 1973

Honorable Robert J. Curran  
Prosecuting Attorney  
Jefferson County  
Post Office Box 246  
Hillsboro, Missouri 63050



Dear Mr. Curran:

This official opinion is issued in response to your request for a ruling on the following question:

"Can the Board of Trustees of a County Health Department authorize spending Health Department funds for Rabies Control?"

Your request stated that this question arose between county health officials and the county court before the approving of the county budget. We note that Jefferson County is a county of class two which adjoins a county of the first class having a charter form of government.

Although your request for this opinion refers to the "County Health Department" there is no statutory authority for such a department in a county of class two. It is assumed that this title is a misnomer, and that you are in fact referring to the board of trustees of the county health center. We are writing this opinion on the basis of that assumption and will refer to the "board of trustees of the county health center" rather than to the "county health department". Since there is no statutory authority for a "county health department", such a department could, of course, have no powers or duties in this matter.

Section 322.120, RSMo 1969, provides, in pertinent part, that:

"The provisions of sections 322.090 to 322.130 shall be applicable to all . . . counties of

Honorable Robert J. Curran

class two which adjoin a county of the first class having a charter form of government."

Section 322.090, RSMo 1969, provides as follows:

"For the purpose of promoting the public health and safety and to prevent the transmission of rabies and to control rabies and to carry into effect the purposes and provisions of sections 322.090 to 322.130, the county court is hereby empowered to adopt by order, rules and regulations which shall include provisions for licensing, catching, impounding, confinement, redemption and isolation and destruction of dogs; impounding, isolation and destruction of other domestic animals exposed to or infected with rabies; reporting of animals affected with, or suspected of having rabies, or suspected of having been exposed to rabies, or known or suspected of having bitten or attacked a person; confinement, impounding and destruction of dogs displaying vicious propensities; declaration of a quarantine and terms of the quarantine for any portion of such county affected by a rabies epidemic, pursuant to the recommendation of the county health commission; the establishment of a schedule of fees and the method for the collection thereof from the licensing, redemption, isolation or confinement and destruction of dogs and other special services for the control of rabies. The county court shall establish, maintain and operate a county dog pound and shall provide the necessary personnel and facilities to operate the same and shall provide appropriate motor conveyances for the capture of stray or rabid dogs and provide all the facilities necessary to carry into effect the regulations adopted under the provisions of sections 322.090 to 322.130 and shall be authorized to expend county funds for the purposes aforesaid; and shall have authority to contract with any city, town or village within any such county for any of the services, facilities or functions created and established under sections 322.090 to 322.130." (Emphasis added)

The statute speaks only of the county court. No authority is given in Sections 322.090 to 322.130 to the board of trustees of

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the county health center to authorize the expenditure of funds for the purposes set out in Section 322.090, RSMo 1969. That section assigns to the county court the responsibility to provide for rabies control in a comprehensive manner, without requiring the participation of the board of trustees of the county health center or of any other county officials not mentioned in the statute.

We therefore conclude that the legislature's explicit delegation of power to authorize the expenditure of county funds for purposes of rabies control runs exclusively to the county court, and that therefore the board of trustees of the county health center may not authorize the expenditure of county health center funds for rabies control.

Nor do we find sufficient authorization for rabies control expenditures by a county health center in Sections 205.010 through 205.155, RSMo 1969, which define the powers and duties of such centers and their trustees. In this regard, we refer you to our Opinion No. 93, October 22, 1952, addressed to the Honorable Wayne W. Waldo. A copy of that opinion is attached hereto. We held there that a county health center has no express or implied power to purchase a site for a county garbage dump, because the duty to provide such a service had been delegated to other local (municipal) authorities. The logic of that opinion applies equally to the instant situation.

In our Opinion No. 415, December 21, 1971, addressed to the Honorable Peter H. Rea (copy of which is attached hereto), we held that the trustees of a county health center would be authorized to appoint personnel on a full or part-time basis to investigate and enforce violations of environmental laws and regulations. But, in that context, there was no explicit statutory provision in Chapter 204, RSMo 1969, or elsewhere, for local investigations of environmental law violations. For that reason, the trustees' implied power under Section 205.042.5, RSMo 1969, to "carry out the spirit and intent of sections 205.010 to 205.155 pertaining to establishing and maintaining a county health center", by expending funds for the payment of such investigative personnel "for the improvement of health of all inhabitants of said county" (Section 205.050, RSMo 1969), was not pre-empted by any alternative delegation of power. But such is not the case with respect to county programs for rabies control.

It has frequently been stated that public corporations " . . . 'can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the

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corporation--not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied." Lancaster v. County of Atchison, 180 S.W.2d 706, 708 (Mo. banc 1944).

CONCLUSION

Therefore, it is the opinion of this office that the board of trustees of the county health center in a county of class two which adjoins a county of the first class having a charter form of government cannot authorize the expenditure of county health center funds for rabies control.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Very truly yours,



JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 93  
10/22/52, Waldo

Op. No. 415  
12/21/71, Rea

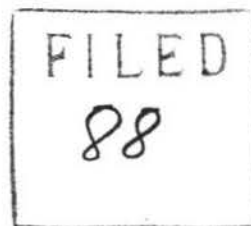
CIRCUIT JUDGES:  
LEGISLATORS:  
CONFLICT OF INTEREST:

The prohibition contained in Article III, Section 12, of the Constitution of Missouri, renders a state senator ineligible to accept an "appointive office" but such section does not preclude him from accepting an appointment to fill a vacancy in an elective office. For the purposes of Article III, Section 12, the office of circuit judge, even in a county under the nonpartisan court plan, is an elective office. Therefore, Article III, Section 12, of the Constitution of the State of Missouri does not preclude a member of the legislature from accepting nomination and appointment as a judge of the circuit court in a county under the nonpartisan court plan.

OPINION NO. 88

April 20, 1973

Honorable Jack E. Gant  
Senator - 16th District  
9517 East 29th Street  
Independence, Missouri 64052



Dear Senator Gant:

This is in response to your request for an official opinion of the Attorney General upon the following question:

"Does Article 3, Section 12, of the Constitution of the State of Missouri, preclude a member of the Legislature (specifically a member of the Senate), from accepting an appointment as a Judge of the Circuit Court in a county under the non-partisan court plan. (Namely Jackson County)"

Article III, Section 12, of the Constitution of Missouri, provides as follows:

"No person holding any lucrative office or employment under the United States, this state or any municipality thereof shall hold the office of senator or representative. When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative.

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During the term for which he was elected no senator or representative shall accept any appointive office or employment under this state which is created or the emoluments of which are increased during such term. This section shall not apply to members of the organized militia, of the reserve corps and of school boards, and notaries public." (Emphasis added).

Because resolution of your question is determined by the meaning to be attributed to the phrase, "during the term for which he was elected no senator . . . shall accept any appointive office . . . the emoluments of which are increased during such term," we begin our analysis with reference to the constitutional history of this section, and the constitutional debates.

### I. Constitutional History

Article III, Section 16, of the Constitution of 1820, provided:

"No senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under this state, which shall have been created, or the emoluments of which shall have been increased during his continuance in office, except to such offices as shall be filled by elections of the people." (Emphasis added).

That provision, with only minor additions, appeared in the Constitution of 1865 as Article IV, Section 15, which provided:

"No senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under this state, which shall have been created, or the emoluments of which shall have been increased, during his continuance in office as a senator or representative, except to such offices as shall be filled by elections of the people." (Emphasis added).



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That provision was substantially altered in the Constitution of 1875. Article IV, Section 12, provided:

"No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this State or any municipality thereof; and no member of Congress or person holding any lucrative office under the United States, or this State, or any municipality thereof, (militia officers, justices of the peace, and notaries public excepted) shall be eligible to either house of the General Assembly, or remain a member thereof, after having accepted any such office or seat in either house of Congress." (Emphasis added).

It was against this constitutional history that the delegates to the constitutional convention considered what provision, if any, should be included in the proposed Missouri Constitution of 1945.

## II. The Constitutional Debates

What is now Article III, Section 12, was initially submitted to the convention as Section 11 of File 17, which provided:

"No person holding any lucrative office under the United States of this State or any municipality thereof (members of the organized militia, justices of the peace, and notaries public excepted) shall be eligible to either House of the General Assembly; and no senator or representative shall during the term for which he shall have been elected, be appointed to any office under this State, or receive remuneration or accept employment under any official or department of the State; any senator or representative violating any provision of this Section shall forthwith forfeit his office in the General Assembly." (Emphasis added) Page 4720.

Mr. McReynolds, handling the file on behalf of the committee, stated the purpose of the proposed section:



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"Mr. President, the present section is Section 12, the one which appears in the Constitution of '75. The section has been elaborated some in this fashion; 'No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this State, or any municipality thereof; and no member of Congress or person holding any lucrative office under this state or receive remuneration or accept employment under any official or department of the State.'

"Now, the reason for that modification was that a practice has grown up in the General Assembly where members of the General Assembly have, in the past accepted employment from the state and since they are called upon to vote upon appropriations and other matters which affect the policy of the particular departments, it was felt that a proper safeguarding of the rights of the departments and of the state in protection of itself and its interest should disqualify the members of the General Assembly from holding office of that kind or accepting employment or remuneration of that kind. That's the primary change which was made. I move the adoption of the section." Page 4720.

However, as soon as the committee proposal had been read by the clerk, and the explanatory statement made by Mr. McReynolds, Mr. Phillips of Jackson County proposed a substitute amendment for the committee's proposal, Section 11. The Phillips' amendment provided:

"No senator or representative, during his incumbency in office, shall be elected or appointed to any office under the United States, this state or any municipality thereof. No member of Congress or person holding any lucrative office under the United States or this state or any municipality thereof, shall be eligible to either House in the General Assembly. Any senator or representative accepting an office under the United States, this state or any municipality thereof, shall be deemed

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to have resigned as a member of the General Assembly and shall exercise no further rights therein or receive further compensation as such member. The provisions of this section shall not apply to the members of the organized militia, members of the school board, and notary public.'" (Emphasis added) Page 4721.

Minor amendments were submitted and debated, but consideration of whether the committee proposal or the Phillips' substitute should be adopted was deferred. Subsequently, debate focussed upon the respective differences and merits of this section as embodied in the committee draft and the Phillips' amendment.

The committee proposal constituted a complete disqualification of a senator or representative from any office or employment during his term. The Phillips' amendment provided for no such disqualification upon a senator or representative and required only that he resign before accepting another office or employment. The conflicting positions and arguments may be illustrated by excerpts from the debates:

"MR. BROWN (OF CHRISTIAN): Judge, while you're working over this section it strikes me that the language used in the fifth or sixth line, I believe it is these words 'and no senator or representative shall, during the term for which he shall have been elected at the course of two years for a representative' -- do you mean by that that in case a representative, he should resign from his office at the end of a twelve month period that he would still be disqualified for twelve more months before he might accept an appointment?

"MR. FORD: My amendment doesn't deal with that phase of it at all.

"MR. BROWN (OF CHRISTIAN): But I am asking you if you care to say what your idea is of the meaning of the section. It strikes me that that is a little bit harsh in this, that if a man should desire to resign from an office and accept a place on the Supreme Bench or some other place that he ought to be permitted to do so. I don't think that he ought

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to be made to serve in case he didn't want to for a period of two years. I am asking you what your opinion is of the meaning of that particular set of words.

"MR. FORD: The great temptation is for a man to serve in the Legislature and favor some certain measure with the expectation that when his time is out or when the bill is passed why then he can resign and get a good job and that was the purpose in making a man that serves in the Legislature surrender any right to serve in some other capacity." Page 4816.

Mr. Phillips was called upon to explain the difference between his substitute proposal and the committee proposal:

"MR. PHILLIPS (OF JACKSON): Well, the present Constitution is in conflict for the reason that the first sentence of it was taken from the Constitution of 1865. If you will refer to your Revised Statutes of 1939 and to Section 12 under Article 4 of the Constitution you will find this information. The first sentence reads this way, 'No senator or representative, shall, during the term for which he shall have been elected, be appointed to any office under this state or any municipality thereof'. The first sentence is taken from Section 15, Article 4 of the Constitution of 1865. The last sentence and that reads, 'And no member of Congress or person holding any lucrative office under the United States or any state or any municipality thereof, exception noted, shall be eligible to either house of the General Assembly or remain a member thereof after having accepted such office'. That was taken from Section 11 of Article 4 of the Constitution of 1865. The two sections were put together but the Convention of 1875 added, 'Or any municipality thereof'. I am reading still from the Constitution in the 1939 statutes. This section apparently contains conflicting provisions as the latter portion, that is the sentence as taken from Section 11, authorizes a ballot acceptance of another position during the term

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for which elected under penalty of no longer remaining a member of the General Assembly while the first sentence is an imperfective prohibition against the acceptance of any office during the term for which you're elected.

"The present Constitution then reads that you can validly accept another position according to the last clause because it says if you accept it it bars you from remaining a member, but the first clause explicitly prohibits (sic) you from doing it. Therefore the conflict. Now the committee evidently overlooked that part because the report had the identical language. 'No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this state', and then it adds as the committee had, 'or receive remuneration under any official department of the state', but it still has the conflict that if you accept a position you can no longer remain a member and then it says, 'during the term to which you are elected you shall not accept it.'

"Now the substitute which I have offered attempts to handle it in a different way. It starts out by saying, 'No Senator or Representative, during his incumbency in office shall be elected or appointed to any office under the United States, this state, or any municipality thereof.' As long as the duties of the office are incumbent upon him he is prohibited from holding this position. Then it again says in the section which I am offering, 'No member of Congress or person holding any lucrative office under the United States, or this state, or any municipality thereof, shall be eligible to either house of the General Assembly.' That's for the purpose of letting him be elected even while he is holding some subsequent position but he must not be holding the position at the time he qualifies either in the Senate or the House, but the main difference between the two is with respect to the conflicting provisions that

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are in the present Constitution, that remain in the Committee report. Under the substitute which I am offering a Senator or Representative cannot, during his incumbency in office, accept any other position but he may, and Judge Mayer I think made a very eloquent speech for the facility for which a man may accept a public position. We need men in public positions so much that if he wants to become Mayor of his town while he has yet three months to serve here in the General Assembly with no chance of its, of a special session, he ought to be permitted to become a Mayor of his town, to be elected, the Mayor of his town. It does say under the amendment I have that when he is ready to qualify for Mayor, he must not have incumbent upon him, this office.

"Now, I am trying to add that facility so that the men come here and gain some training and facility in government and you may use them in your county, in your city or in some other position and I do not think that it is ever intended by the present Constitution, but when it is that he qualifies for any other position he no longer remain a member. I don't think it is ever intended to bar him.

"MR. DEASON: Mr. Phillips, under either one of these sections or under this section that is proposed by the Committee over your substitute, would it be possible for me as a member of the Legislature, if I had three or four friends on a close vote, to support a proposition of some kind to establish a new department or a bureau or a commission with the thought of resigning my place in the Legislature and being appointed to head that said bureau or commission?

"MR. PHILLIPS (OF JACKSON): Well Mr. Deason, it would be possible but it is not probable that you or any other member who takes his oath very seriously in the General Assembly would stoop to that. Men just don't do those thing and I don't think you would.

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"MR. DEASON: Well, I have been in the Legislature because I live in a Democratic county, but I was just wondering about the possibilities of it. It seems to me, Mr. Phillips, that under your section, or under your substitute that a man could resign from the Legislature to take over or handle a job like that.

"MR. PHILLIPS (OF JACKSON): Well, you would have to be appointed by the Governor or someone and I think the remoteness of that - the situation I am trying to reach is in your county you got your county court. A man frequently wants to become a county judge but he is still a member of the General Assembly. He never intended to return. The vacancy comes in August and the Governor now can appoint him legally without this section staring him in the face and the Governor sometimes don't appoint him. Judge Clark of the Supreme Court again had an unexpired term. He had not filed from the Senate from his district. He had filed in the Supreme Court. A member of the Supreme Court died along in the summertime and the Governor wanted to appoint him. He should have been appointed but the net result was that this section stared them in the face and they were afraid to appoint him as a judge as it was written. In the present Constitution it would conflict. The committee Report does not clarify it but I am saying that I am of the opinion that the way I handle it does clarify it and I hope it will be adopted so that there will be no more difficulty over a matter of that character.

\* \* \*

"MR. COLEMAN: Mr. Phillips, . . . and now you want to leave it possible for him, by resigning, to make it eligible, is that it?

"MR. PHILLIPS (OF JACKSON): As long as the duties of the officer is incumbent upon him he is precluded from accepting a mayorship or a council position or any local position, any



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county position or any state or United States position, but if he is appointed to such a position then he should be permitted to resign. I never heard of a rule that a man couldn't resign from the Supreme Court of the United States or any other position and I don't think that it was ever intended in 1875 when they threw those sections together that they should prevent a man from resigning, because in the very next sentence it says that if he does take a position in Congress or any place he should be deemed to vacancy.

\* \* \*

"MR. COLEMAN: Mr. Phillips, isn't there a pretty good reason for provisions with respect to legislative officers shall not be eligible to accept any such appointments for the reason that has been stated here, and thereupon resign to accept the appointment?

\* \* \*

"MR. PHILLIPS (OF JACKSON): Yes, there is a possibility I know of no reason why we should write a constitutional provision preventing it. Page 4820-4823.

\* \* \*

"MR. PHILLIPS (OF JACKSON): It is in the next sentence, that no senator or representative, during the term which he shall have been elected to be appointed to any office under this state, or receive remuneration or accept employment under any official department of the state. It is the term that I am explaining.

"MR. CRANE: In other words, you want the Legislature to either accept an appointment under any department of the state government by resigning his office.

"MR. PHILLIPS (OF JACKSON): Well, the city government or county government or any place where he would need it.



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"MR. CRANE: Well, your substitute of course permits him also to resign from the Legislature and take a position under the state government, doesn't he?

"MR. PHILLIPS (OF JACKSON): Yes, and there might be a very good reason for that, like Senator Clark was still a member of the Senate and he would have been appointed a Supreme Judge and he had not filed for the Senate and his term was not yet out. It was in August when the vacancy occurred in the Supreme Court and his term continued in August until December 31st and I would like to rectify that situation.

"MR. CRANE: Mr. President, I think Mr. Phillips is also interested in the other feature of it which was objected to in the Committee. Now, my recollection is that Mr. Phillips had the very same proposal before the Committee and the matter of whether or not the person elected to the Legislature could resign during his term of office and take another job with the state government was fairly discussed. When I voted for the Committee Report I voted for it on the basis that a member of the Legislature couldn't resign from the Legislature and be appointed to any office under the state government in consideration for any service he might have performed while a member of the Legislature in order to obtain such appointment. I think to the best of my mind that there is very great distinction on that one issue. Now, the matter he speaks of as to rendering any one of those in office, a municipality or any other division of government, anything that prevents him from being eligible to run for election, why I would have no objection, but on the other hand I think it was a very fundamental issue that was discussed in the Committee and we had this same discussion there offered by Mr. Phillips and we decided in there, as I remember it, that we didn't want anyone in the Legislature to accept employment under the state government during the term for which he had been elected to the Legislature. Pages 4826-4827.

\* \* \*

"MR. SHEPLEY: Mr. President and fellow delegates, it seems to me that this provision that we're discussing goes a little further than the question of the creation of an office by a member of the Legislature or through his influence and then his resigning to accept appointment to that office. It seems to me that we're dealing now with a branch of the government that writes the ticket for the state, makes all the appropriations, enacts all of the laws other than those enacted by the people, and what they are trying to do is to take away, to remove any factors which might have an influence on a member's judgment in voting on the various questions that are brought before the General Assembly. In other words, it would not be necessary to create a new office. I might be a member of the General Assembly and the question might come up concerning an appropriation for one of the departments. If I wanted a pretty good job in that particular department that was open, I think naturally I would be inclined to be generous with my vote for the appropriations. I should imagine there would be a great many occasions when a man's judgment to some extent might be swayed by a selfish interest if he could be eligible himself to benefit as a result of the vote and I think it's a good thing. After all man serves for two years in the Lower House and four in the Senate and if he accepts that and runs for election and offers himself to the people, just as Governor Park has mentioned, I think the people have a right to expect him to continue in that office, rather than to resign to take some other appointive job, whether he is instrumental in creating it or not. Page 4830.

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"MR. FORD: Mr. President, I agree in principle with what Mr. Opie has said. Members of the Legislature, while the office you might say is of not so much importance, the things

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with which they are dealing affects everybody in the State of Missouri and in their legislative capacity they are a very important official and what they do lasts long after they have gone home and for that reason they ought not to be submitted to the temptation of doing anything of that particular kind that might be detrimental to the interests of the people in order to further their own individual interests. Now, we're worrying too much about the fellow that is holding the office and not enough about the people whom he is serving. This provision is not put in there solely as a penalty on the fellow that is holding the office, but it is to protect the people themselves against his action which he might think at the time would not affect a man because he is thinking of his own personal interest and any man who accepts the position of a Legislator in the state, the people expect him to give his whole-hearted attention to that and not allow his personal ambitions to interfere. I think the Committee's original section with the slight amendments that clarify it, is the better section and that it should be adopted and the Phillips amendment defeated. Page 4831.

\* \* \*

"PRESIDENT: Further discussion of the substitute?

"MR. CLAYTON: Mr. President, I hope the substitute will be defeated. It seems that the proponents have cited individual cases here on the floor this afternoon where certain ones were prevented from being appointed to certain offices or accepting appointment by reason of this provision. It seems that they apparently are overlooking the points brought out by Governor Park and Delegate Shepley that when they are elected by the people of their county or district, whichever the case may be, they are accepting a responsibility that they should carry out to the end. It doesn't seem to me that we should change this proviso that pro-

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hibits this sort of thing. As the section now reads it does not prevent an employee of the municipality from resigning (sic) and accepting employment. The main thing that the proponents of the substitute wish eliminated is the provision that a member of either the House or Senate cannot accept another position with the state during the term for which he was elected.

". . . He runs for office subject to the present provision in the Constitution and I think that it would be very unwise to adopt the substitute." Page 4833.

Debate was concluded and on a roll call vote, the Phillips' substitute was defeated, and the committee proposal adopted.

Subsequently, the Phillips substitute was brought up for reconsideration when there was greater attendance at the convention. Again there was debate upon the two conflicting proposals.

Again Mr. Phillips was called upon to explain the purpose of his substitute:

"MR. PHILLIPS (OF JACKSON): Senator, you were not here the other day I am sure when the matter was up for discussion and I call attention to the fact that the present Constitution has a very serious conflict, but in one place in the present Constitution it prohibits a Senator or Representative, during the term of office for which he is elected, from accepting a position with the United States, this state, or any municipality. While in another section of the present Constitution, there is, at least there is implied authority for him to accept the office, but under the penalty of no longer remaining a member of the General Assembly. In other words, the present Constitution is clearly in conflict for the reason one place there are words of absolute prohibition, while in the next sentence, which comes from a different original source, there is an acceptance which applied a valid acceptance of the other office, but under the penalty of no longer remaining a member of the General As-

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sembly. Now, that's the condition of the present Constitution. Now, the Committee, though, reported a section which in my opinion is an absolute prohibition against a Senator or Representative, during the term for which he has been elected, and then I made the point that there would be no longer any doubt about it under the Committee Report. Under the Constitution as it is now, it is only a colorable doubt. They go ahead and do it. They go ahead and resign and accept other positions when the positions occur, but under the Committee's report there would be an absolute prohibition and I made the point the other day that Mr. Mayer made a splendid talk on the, almost the necessity of men of qualification being permitted to be harnessed up and used for positions of advancement wherever they may come and I called attention to the fact that a man serving in the General Assembly, frequently in one term or two terms, find the facility to become a valuable officer in some other capacity and he should not have to let it go by. That is about the purport of the argument the other day, Senator.

"MR. MC REYNOLDS: Thank you, sir. Now, I understand, Mr. President, that the purpose behind Mr. Phillips' amendment is to authorize a member of the General Assembly, during his term of office, to accept other employment. Of course he has to resign and get out, but he can accept it. There is no prohibition. Now of course there is a prohibition in the section prepared by the committee. It was the intention that it should carry that prohibition. The section reads: 'No Senator or Representative shall during the term for which he shall have been elected be appointed to any office under this State, or receive remuneration or accept employment under any official or department of the State.' . . .  
Page 5202.

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"MR. DEASON: Mr. President, I am opposed to the Phillips' substitute and I don't agree with the answers that Senator McReynolds gave to Delegate Jones. As I read Line 7, Page 5, it say, 'be appointed to any office under this state'. Now I may be wrong, but I can't find in there where it says that they can't be a candidate and elected. Now, I know that we have a very distinguished gentleman who is a member of the state Senate now, a candidate for Governor, and I don't see how that this section in the Constitution would prevent some other distinguished Senator some day from being a candidate for Governor because it says that 'And no Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this state or receive remuneration or accept employment under any official or department of the state. I can't see there that it would prevent a Senator from offering himself to the people for an elective office.'" Page 5211.

Prior to the vote, Mr. Phillips summarized his position:

"MR. PHILLIPS (OF JACKSON): Mr. President, I am not going to go over what I said the other day in detail. There was a small house here. Twenty-one members voted one way and twenty-seven, as I recall it, the other way. We have a much larger assembly here today, but I stated then that it was purely a matter of policy involved. . . .

". . . Then we have left the broad public policy. Shall the executive department and shall the judicial department be permitted, during the terms for which they are elected, to resign whenever the incumbent desires to accept a better position or the people desire to call him to a better position? I should say, by all means, yes.

"The other day I cited the situation in which our own Governor Park resigned from the other Constitutional Convention to become a circuit



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judge and then resigned as a circuit judge to become the Governor of this state. Now, those are instances and you can multiply the instances in which there has been advancement of men in public service by resigning from the previous positions which they have handled. Now, why that limitation should be imposed on the legislative department which would probably desire to get the best ability we can, I am not able to see, and I think if this Committee report is adopted and the section which I proposed is not, it will be written down in history that this Convention was so afraid of the fact that there would be some evil arise out of it that it adopted what is an unworkable public policy. . . .

". . . Many a time you will cause the field of good candidates for office or good selections to be narrowed because you have a constitutional prohibition, and during the term of office a very available man is constitutionally prohibited from being considered for that position.

". . . I think it is an advance in government and I hope that the Convention will adopt it."  
Pages 5222-5223.

The Phillips' substitute, as a result of several amendments, now provided that:

"No Senator or Representative during his incumbency in office shall qualify and hold any office or employment under the United States, this state or any municipality thereof. No member of Congress or person holding any lucrative office under the United States, this state or any municipality thereof, shall qualify as a member of either house of the General Assembly. Any Senator or Representative accepting an office or appointment under the United States, this state or any municipality thereof, shall be deemed to have resigned as a member of the General Assembly and to exercise no further rights therein nor receive further compensation as such member.



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The provisions of this section shall not apply to members of the organized militia, reserve corps, members of the school boards and notaries public." (Emphasis added).

Upon a roll call vote, the substitute was adopted, and the committee proposal was defeated. Later, with no debate, an amendment was added to Section 11 of File 17.

"MR. MC REYNOLDS: Now, Mr. President, I overlooked the fact that we did not close Section -- the section which was under consideration at the time of the recess. I think it was 11. I asked the Chair to defer the announcement on that until I could check the language of it, and I found that the amendment I had in mind has already been inserted. Therefore, so far as I am concerned the section can be closed.

"PRESIDENT: Are there further amendment to Section 11?

"MR. MORTON: Mr. President, I have an amendment which I have listed as 11a rather than trying to amend the File or ask that it be opened up.

"PRESIDENT: By adding an additional section?

"MR. MORTON: By adding a new section, yes, sir.

"PRESIDENT: Is it much the same subject matter as Section 11?

"MR. MORTON: The subject matter is the same but it doesn't affect the subject.

"PRESIDENT: If this is an entirely unrelated section, Mr. Morton . . .

"MR. MORTON (Interrupting): No, it is not unrelated. It should be a part of the section.

"PRESIDENT: The section is still open for amendments, Mr. Morton.

Honorable Jack E. Gant

"MR. MORTON: All right, I will then submit it as an amendment by adding to the present section.

"(Amendment submitted.)

"PRESIDENT: Mr. Morton, would you consent to the Clerk making certain corrections here in order to make it conform?

"MR. MORTON: I have another amendment here.

"PRESIDENT: Would you add this to the end of the section?

"MR. MORTON: Yes, sir.

"PRESIDENT: And then will you authorize the Clerk to frame it so that it will be an addition to it, added on the end of Section 11?

"MR. MORTON: Yes, sir, I may add in explanation, Mr. President, that I submitted that to Mr. Phillips and Mr. Phillips accepted it, and I showed it to Senator McReynolds and he was agreeable to it, and so I am submitting it now and all I want to say is it is part of the federal Constitution on this matter and I move its adoption.

"MR. SHEPLEY: Mr. President, before it is read, may I ask Mr. Morton so that we may not have confusion, whether his addition should not be inserted in the third to last line of the Phillips substitute rather than at the end of the section?

"MR. MORTON: If you say so, yes.

"PRESIDENT: May the Chair suggest that as far as the placement of that matter is concerned, that the Phraseology Committee can straighten it out when it gets there. I think the Clerk has written the amendment now so that it will be an addition at the end of Section 11. (to Clerk) Put it that way and the Phraseology Committee can straighten it out.

Honorable Jack E. Gant

"(Clerk read as follows:)

"AMENDMENT NO. 43. Amend File No. 17, Page 5, Section 11 by adding to end of Section 11, as amended, the following language:

"No member of the General Assembly shall during the time for which he was elected be eligible to hold any appointive civil office, or position, under the authority of the State which shall have been created or any appointive state civil office or position, the emoluments whereof shall have been increased during such term." (Emphasis added)  
Pages 5238-5240.

The amendment was adopted and the section was finally perfected.

Reference to the constitutional debates demonstrates that it was the intent of the delegates to the constitutional convention that as between a complete prohibition or no prohibition upon a senator's or representative's eligibility for another office during his term, there should be no such prohibition. Therefore, it is our view that any limitation upon such eligibility should be severely limited and strictly construed.

### III. Application of the Rules of Construction and Case Authority

Article III, Section 12, of the Constitution of Missouri, provides, in part, as follows:

". . . When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative. During the term for which he was elected no senator or representative shall accept any appointive office or employment under this state which is created or the emoluments of which are increased during such term. . . ."  
(Emphasis added).

Honorable Jack E. Gant

As stated in your opinion request, the question which arose as a result of your nomination as one of three names on a panel submitted by a nonpartisan judicial commission to the Governor for selection to fill a judicial vacancy in the Sixteenth Judicial Circuit of Missouri, is whether an appointment for the unexpired term is prohibited by Article III, Section 12, of the Missouri Constitution. During your present term as state senator, the General Assembly passed Act 105, Seventy-Sixth General Assembly, Second Regular Session. That act, which became effective on August 13, 1972, provided for an increase in the compensation payable to all judicial officers of the state. Included within the judicial officers who receive an increase in compensation were the judges of the Circuit Court of Jackson County, Missouri. Thus, the emoluments of office were increased during the term for which you were elected. Therefore, the critical issue is the meaning of the phrase, ". . . no senator . . . shall accept any appointive office . . ."

To illustrate, does the disqualification contained in Article III, Section 12, extend to any office for which the emoluments have been increased during the legislator's term? Or, does such disqualification extend only to certain offices? Or, does such disqualification extend to the method by which any office is obtained? As suggested, the issue is the meaning of the phrase, ". . . no senator . . . shall accept any appointive office. . .," and the specific question is the meaning of the word "appointive" in the context of Article III, Section 12.

Construction of a constitutional provision is generally subject to the same rules of construction as other laws with due regard being given to the broader scope and objects of the constitution as the charter of popular government and intent of organic law is the primary object to be attained in construing it. State ex rel. Curators of the University of Missouri v. Neill, 397 S.W.2d 666 (Mo. 1966); Wring v. City of Jefferson, 413 S.W.2d 292 (Mo. 1967). The intent and purpose of the constitutional provision is required to be determined primarily from the language used. Chaffin v. County of Christian, 359 S.W.2d 730 (Mo. 1962). Consequently, in construing a constitutional provision, nontechnical words are to be taken in their natural and ordinary meaning. State ex rel. Keystone Laundry and Dry Cleaners, Inc. v. McDonnell, 426 S.W.2d 11 (Mo. 1968).

It has been recognized that the right to hold public office, either by election or appointment, is one of the valuable rights of citizenship, and constitutes an implied attribute of citizenship and any curtailment of the right to hold office should not

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be considered prohibited except by plain provisions of law. Carter v. Commission on Qualifications of Judicial Appointments, 93 P.2d 140 (Calif. 1939); 63 Am.Jur.2d, Public Officers and Employees, Section 64.

Does the phrase ". . . no senator . . . shall accept any appointive office . . ." preclude a senator from accepting any office, the emoluments of which are increased during his term, regardless whether that office is obtained by appointment or election. Such a construction has previously been held to be improper. Opinion of the Attorney General, Manford, No. 59, June 18, 1968. That opinion held that a member of the general assembly can become a candidate at an election for the office of circuit judge even though such office was established by the general assembly in which such member sits.

There are only two other possible interpretations which may be attributed to the phrase ". . . no senator . . . shall accept any appointive office . . ." The phrase either means that a senator may not accept any appointive office or it means that a senator may not accept any office when that acceptance is based upon an appointment.

We conclude that the proper interpretation of the phrase, ". . . no senator . . . shall accept any appointive office . . ." precludes a senator from accepting an "appointive office" but does not preclude a senator from accepting an elective office even though that acceptance is based upon an appointment.

The committee proposal, which was rejected, provided that ". . . no senator or representative shall during the term for which he shall have been elected, be appointed to any office under this state, . . ." The Phillips' substitute amendment, which was adopted, contained no such prohibition, provided the senator or representative first resigned as a member of the general assembly. The subsequent amendment prohibited acceptance of "an appointive office."

The word "appointive," as found in Article III, Section 12, is an adjective, and thus modifies and qualifies the noun office. Used as an adjective, it is to be distinguished from its use as a noun, i.e., the act of appointing or designating for an office or position, or as a verb, to name or select for an office or position.

Therefore, because of the language employed in this provision, the intent of the drafters as expressed through the debates,



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and applying the usual rules of construction, we conclude that the limitation that is expressed in Article III, Section 12, of the Constitution of Missouri, extends only to "appointive offices." If it had been the intent of the drafters of the constitution to prohibit entirely the appointment of legislators to any office, it would have been a simple matter to employ language to express that intent. Carter v. Commission on Qualifications of Judicial Appointments, supra. That was the intent expressed in the Committee's proposed section which prohibited "appointment to any office" but such proposal was defeated, and rather, the present language which prohibits the senator or representative from accepting "any appointive office" was adopted.

The disqualification extends to the nature of the office, i.e., whether an elective or appointive office, and not to the method by which a vacancy in office is filled. Many offices, which are elective offices, provide for filling the vacancy by appointment. See: Sections 105.030 and 105.050, RSMo 1969. For example, the Office of Attorney General is an elective office, however, a vacancy is filled by appointment. Section 105.050, RSMo 1969. The Office of Senator of the United States is an elective office, however, a vacancy is filled by appointment. Section 105.040, RSMo 1969. Reference to these situations is made to demonstrate that the classification of an office as an appointive office or an elective office is dependent not upon the manner in which a vacancy is filled, but rather the basic method by which a person is selected to fill such office for a full term.

The question then becomes whether the office of circuit judge in the Sixteenth Judicial Circuit is an appointive or elective office. An appointive office is one which is acquired by appointment in the exercise by the appointing authority of a delegated power, while an elective office is acquired by election as a direct choice of all of the members of the class or body from which the choice can be made. See: State ex rel. Smith v. Bowman, 170 S.W. 700 (Mo.App. 1914).

A substantially identical issue was before the Supreme Court of California in Carter v. Commission on Qualifications of Judicial Appointments, supra. That case involved a mandamus proceeding against the Commission to compel it to consider and act upon Carter's qualifications for the office of associate justice of the Supreme Court of the State of California. Carter had been appointed by the governor to the office of associate justice of the Supreme Court to fill a vacancy created by the death of the incumbent, and the governor submitted his name to the Commission

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on Qualifications for confirmation pursuant to their constitutional provision. The commission refused to consider the name on the basis that he was ineligible for office by virtue of Article IV, Section 19, of the California Constitution. Their constitutional provision provided that:

"No Senator or Member of Assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this State; provided, that this provision shall not apply to any office filled by election by the people."

The court concluded that such office was an elective office rather than an appointive office. The court stated:

". . . The method of filling vacancies by appointment by the governor under the new procedure is not materially different from the old. The method of nomination has been materially changed, and the candidacies for the office have been restricted to persons who occupy the offices or to persons who have theretofore been nominated by the governor. But the names of the candidates continue to be 'placed upon the ballot for the ensuing general election', and the electors vote on the question whether such candidate shall 'be elected to said office'.

"The language of the new section 26 and of the older sections of the same article which were left undisturbed indicate without question that the Justices of the Supreme Court hold and continue to occupy their offices only at the will of the electorate. . . ."  
93 P.2d at 145. (Emphasis added).

The Circuit Court of Jackson County, Missouri, is subject to the nonpartisan court plan. Article V, Section 29 (a), Constitution of Missouri, as amended, 1970. That section provides, in part:

"Whenever a vacancy shall occur in the office of judge of . . . the circuit . . . courts within . . . Jackson county, . . . the governor shall fill such vacancy by appointing one of three persons possessing the qualifications



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for such office, who shall be nominated and whose names shall be submitted to the governor by a nonpartisan judicial commission established and organized as hereinafter provided. If the governor fails to appoint any of the nominees within sixty days after the list of nominees is submitted, the nonpartisan judicial commission making the nomination shall appoint one of the nominees to fill the vacancy."

While the vacancy is filled by nomination and appointment, it is only for a limited time. Article V, Section 29 (c) provides that:

"Each judge appointed pursuant to the provisions of sections 29 (a)-(g) shall hold office for a term ending December thirty-first following the next general election after the expiration of twelve months in the office. . . . Not less than sixty days prior to the holding of the general election next preceding the expiration of his term of office, any judge whose office is subject to the provisions of sections 29 (a)-(g) may file in the office of the secretary of state a declaration of candidacy for election to succeed himself. . . . If such declaration is filed, his name shall be submitted at said next general election to the voters eligible to vote . . . If a majority of those voting on the question vote against retaining him in office, upon the expiration of his term of office, a vacancy shall exist . . . ; otherwise, said judge shall, . . . remain in office for the number of years after December thirty-first following such election as is provided for the full term of such office, and at the expiration of each such term shall be eligible for retention in office by election in the manner here prescribed." (Emphasis added).

A circuit judge under the nonpartisan court plan who is a candidate to succeed himself under the provisions of the Missouri nonpartisan court plan is required pursuant to the provisions of Section 120.345, RSMo 1969, to file his declaration of candidacy in person with the Office of the Secretary of State unless he

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satisfies certain statutory exceptions. Opinion of the Attorney General, Kirkpatrick, No. 359, July 10, 1970. That section defines the method by which candidates for various elective offices shall officially declare their candidacy.

#### CONCLUSION

Therefore, we conclude that the prohibition contained in Article III, Section 12, of the Constitution of Missouri, renders a state senator ineligible to accept an "appointive office" but such section does not preclude him from accepting an appointment to fill a vacancy in an elective office. For the purposes of Article III, Section 12, the office of circuit judge, even in a county under the nonpartisan court plan, is an elective office. Therefore, Article III, Section 12, of the Constitution of the State of Missouri does not preclude a member of the legislature from accepting nomination and appointment as a judge of the circuit court in a county under the nonpartisan court plan.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Gene E. Voigts.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jack E. Gant", written in a cursive style.

COUNTY PLANNING AND ZONING: County planning and zoning under Sections 64.510 to 64.690, RSMo, adopted by the voters of Marion County, Missouri, on November 3, 1964, cannot be terminated by a vote of the people. A county court cannot abolish the county planning commission after it has been established nor can a county court repeal all planning and zoning ordinances and regulations.

OPINION NO. 90

March 28, 1973



Honorable Ronald R. McKenzie  
Prosecuting Attorney  
Marion County  
Tower Plaza, Clinic Road  
Hannibal, Missouri 63401

Dear Mr. McKenzie:

This is in response to your request for an opinion from this office regarding the authority of the county court over the county planning commission and their ordinances and regulations. It is our understanding that Marion County has a planning commission which commission has jurisdiction in county planning and zoning matters. You inquire whether planning and zoning approved by a vote of the people of Marion County on November 3, 1964, may be abolished by a vote of the people.

Marion County is a third class county and the provisions of Chapter 64, RSMo, govern. Section 64.510 to and including Section 64.690, RSMo 1959, were in effect and governed planning and zoning as was approved by the people of Marion County on November 3, 1964.

You inquire whether Section 64.900, RSMo Supp. 1967, authorizes the county court to submit to the voters of Marion County the question whether county planning and zoning should be terminated.

We are enclosing herewith Opinion No. 234 issued by this office on August 19, 1964 to Honorable William W. Hoertel, Prosecuting Attorney of Phelps County and Opinion No. 478 issued by this office on December 11, 1969 to Honorable G. William Weier, Prosecuting Attorney of Jefferson County.

We believe these opinions answer the question you have submitted regarding the authority of the county court to submit to

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the voters whether county planning and zoning in Marion County should be terminated. As stated in these opinions, it is our view that there is no authority under Sections 64.510 to 64.690 for the question to be submitted to the vote of the people to terminate planning and zoning in Marion County.

We believe these opinions answer the other questions you submit except question No. 4 regarding authority to repeal an ordinance concerning subdivisions.

You inquire whether the county court can repeal all planning and zoning ordinances and regulations.

We are unable to find any provisions under Sections 64.510 to 64.690, RSMo, for the repeal of planning and zoning regulations once they are adopted. Section 64.670 provides that the regulations imposed and the districts created under authority of Sections 64.510 to 64.690 "may be amended from time to time by the county court by order" but no such amendment shall be made by the county court except after recommendation of the county planning commission or zoning commission at the hearings thereon by the commission. The word "repeal" is not found in any provisions of these statutes. In Section 64.580, RSMo, express provision is given to change and amend the master plan and regulations governing subdivisions of land but provides that such subdivision regulations shall be adopted, changed or amended only after a public hearing. The question is whether this includes the repeal of a regulation legally adopted.

In 101 C.J.S. Zoning §124 in discussing whether the legislative body of a municipality ordinarily has power to repeal previously adopted zoning regulations, the rule is stated as follows:

"Except where the county or municipal body is granted only the power to create or establish zones, and is not granted the power, expressly or by implication, to supervise, control, or repeal its zoning ordinances, a municipality or other governmental entity may repeal a zoning ordinance or regulation, although such course cannot adversely affect rights theretofore acquired under the sanction of the ordinance. This power should be exercised reasonably. An amendment is in some instances affected by repeal of the ordinance to be amended and enactment of the new ordinance."

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In *Stillbar Construction Company v. Town of Harrison*, 143 N.Y.S.2d 804 (1955), the court held the municipality's power to revoke or repeal its zoning ordinances is plenary and inherent in the grant to it of legislative power to enact ordinances.

In *City of St. Louis v. Cavanaugh*, 207 S.W.2d 449 (Mo. 1948), the issue was whether an ordinance of the city of St. Louis which repealed the original ordinance that provided the bridge across the Mississippi River should "at all times be free and forever remain a free bridge" was a valid ordinance. The court held the power of the city of St. Louis to repeal ordinances providing for a free bridge across the Mississippi River was incidental to the power to enact them.

*State ex rel. Luechtefeld v. Arnold*, 149 S.W.2d 384 (St.L.Ct. App. 1941) involved a general zoning ordinance of the city of Richmond Heights which authorized dwellings for "one family only." Ordinance No. 147 which authorized dwellings for "one family only" in the district where relator sought to build duplex dwellings was duly enacted. Thereafter Ordinance No. 349 was enacted allowing two family dwellings in the district, but the ordinance was enacted without reference to or recommendation from the city planning commission or a public hearing as required by statute. The only purpose of this ordinance was to repeal Ordinance No. 147. The court held Ordinance No. 349 was invalid because it had been enacted without compliance with the requirements of the statutes and the zoning ordinances affecting changes in the regulations, restrictions, and boundaries of the zoning district. The question was not raised in this case that the city council had no authority to repeal a zoning ordinance properly adopted. The court based its decision on the theory that the repealing ordinance had not been properly adopted which we believe implies that the city council had authority to repeal a prior enacted zoning ordinance by a subsequent ordinance duly adopted in the manner and method provided for adopting the original zoning ordinance. See also *Landau v. Levin*, 213 S.W.2d 483 (Mo. 1948).

It is our view that planning and zoning regulations may be amended or repealed in the same manner in which they were enacted but the county court cannot repeal all planning and zoning ordinances and regulations.

#### CONCLUSION

It is the opinion of this office that county planning and zoning under Sections 64.510 to 64.690, RSMo, adopted by the voters of Marion County, Missouri, on November 3, 1964, cannot be terminated

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by a vote of the people. A county court cannot abolish the county planning commission after it has been established nor can a county court repeal all planning and zoning ordinances and regulations.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 234  
8/19/64, Hoertel

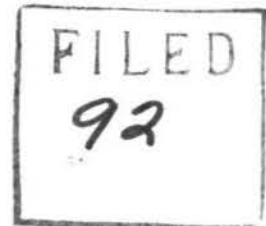
Op. No. 478  
12/11/69, Weier



June 19, 1973

OPINION LETTER NO. 92  
Answer by Letter - Jones

Honorable George J. Donegan  
Representative, District 146  
1714-18 East Meadowmere  
Springfield, Missouri 65804



Dear Representative Donegan:

This letter is to acknowledge receipt of your request for an opinion from this office in regard to the constitutionality of certain provisions of Senate Bill No. 548, which was passed by the 76th General Assembly and which became effective on August 13, 1972, relating to the Missouri State Employees' Retirement System. Specifically you inquire as to whether or not subsection 2 of Section 104.372, RSMo, is arbitrary and discriminatory as to members who retired prior to August 31, 1972.

Subsection 2 of Section 104.372, RSMo, as set forth in House Bill No. 548, provides as follows:

"2. When a member who was an employee on August 31, 1972, thereafter retires, or when a former member who has been restored creditable service in accordance with the provisions of subsection 4 or 6 of section 104.350 retires, or who is entitled to a deferred annuity under subsection 4 of section 104.330, the board shall pay him an amount equal to his accumulated contributions and credited interest to the date of his retirement. This amount is in addition to any retirement benefits to which he is entitled; but, the provisions of this subsection shall not apply to members who elect to receive benefits because of service in the general assembly."



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Thus, under the above statutory provision, a member who retired prior to August 31, 1973, is not entitled to a refund of his accumulated contributions and credited interest, in addition to his retirement annuity.

It is a well-settled rule of constitutional construction that only when there is a clear conflict between a legislative enactment and the Constitution are the courts warranted in declaring the law to be void. Borden Company v. Thomason, 353 S.W.2d 735, 743 (Mo. banc 1962). There is also authority for the proposition that as to the question of classification, the courts should sustain it if there is any reasonable basis for the classification. Ballentine v. Nester, 164 S.W.2d 378 (Mo. banc 1942). The general rule with respect to the classification of beneficiaries is stated in 60 Am.Jur.2d Pension and Retirement Funds §39, page 909, as follows:

" . . . And the courts have sustained the constitutional validity of statutory provisions relating to classification of beneficiaries of pension or retirement benefits for public civil employees, as against the contention that such provisions amounted to unlawful discrimination against persons who would otherwise be entitled to receive the benefits of the fund, or that they constituted class legislation not based on a reasonable ground of distinction."

We have examined the portion of the bill in question and find no constitutional infirmity.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

October 11, 1973

OPINION LETTER NO. 96  
Answer by Letter - Nowotny

Mr. Clifford L. Summers  
Acting Executive Director  
Missouri Water Resources Board  
Post Office Box 271  
Jefferson City, Missouri 65101



Dear Mr. Summers:

This letter is in answer to your opinion request asking whether Section 256.300, RSMo, authorizes the Water Resources Board to enter into a certain contract with the United States which contains the following paragraph:

"ARTICLE 9 - Release of Claims. The User shall hold and save the Government, including its officers, agents, and employees harmless from liability of any nature or kind for or on account of any claim for damages which may be filed or asserted as a result of the storage in the Project, or withdrawal, use, or release of water from the Project, made or ordered by the User or as a result of the construction, operation, or maintenance of the features of appurtenances owned and operated by the User, provided, that this shall not be construed as obligating the User to hold and save the Government harmless from damages or liability resulting from the sole negligence of the Government or its officers, agents, or employees and not involving negligence on the part of User or its officers, agents, or employees."

Section 256.300, RSMo, provides:

"The water resources board is authorized to make reasonable assurance that demands for

Mr. Clifford L. Summers

use will be made within a period of time to permit payment of costs allocated to water supply within the life of the project, and upon receipt of specific appropriations from the fund may enter into contract with the appropriate federal departments for purposes of discharging nonfederal responsibilities relating to municipal and industrial water supply storage as permitted by applicable federal legislation on water resource projects and, in so doing, shall consider the projected water needs of the area that can be served by the project and shall also consider the ability of future users to reimburse any investment of funds that may be made by this state."

It is settled that the state may be sued only with its consent. See Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare, State of Missouri, \_\_\_\_ U.S. \_\_\_\_, 36 L.Ed.2d 251, 93 S.Ct. \_\_\_\_ (1973); Dicarlo Construction Co., Inc. v. State, 485 S.W.2d 52 (Mo. 1972); State ex rel. Eagleton v. Hall, 389 S.W.2d 798 (Mo. banc 1965); Kleban v. Morris, 247 S.W.2d 832 (Mo. 1952).

The issue posed by your question is whether Section 256.300 may be construed as a waiver of the state's sovereign immunity. It is our view that Section 256.300 does not authorize a waiver of sovereign immunity.

Section 256.300, when read pari materia with Section 256.290, RSMo, grants the Water Resources Board the authority to contract with the United States for municipal and industrial water supply storage in public works projects; it does not grant authority to waive the state's immunity from suit. See Attorney General's Opinion No. 78 issued May 25, 1972.

Section 8.623 (House Bill No. 77, 77th General Assembly), provides:

"Any repair or maintenance of any building, facility, or other property of the state of Missouri undertaken after the effective date of this act involving the use of federal funds or other federal assistance shall, whenever practicable, conform to the standards of this act, and any agency or entity of the state of Missouri authorizing such repair

Mr. Clifford L. Summers

or maintenance may enter into an agreement with the federal government or any agency thereof whereby the state of Missouri would hold harmless or hold free the government of the United States from any damages which may result from the repair or maintenance."

Any law which purports to waive the sovereign immunity of the state must be strictly construed. It is our view that the above section, read in conjunction with the remainder of the bill (including the title of the bill) which deals with standards for public buildings required to make such buildings accessible to the handicapped, does not authorize the Water Resources Board to enter into the hold harmless agreement.

It is the opinion of this office that the Water Resources Board is without authority to enter into a contract with the United States which provides that the state of Missouri will hold and save the United States harmless from liability of any nature or kind for or on account of any claim for damages which may be filed or asserted as a result of the storage, withdrawal, use or release of water in the Long Branch Lake on East Fork Little Chariton River, Missouri, made or ordered by the state of Missouri or as a result of the construction, operation or maintenance of the features of appurtenances owned and operated by the state of Missouri.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 78  
5-25-72, Summers

March 22, 1973

OPINION LETTER NO. 97  
Answer by Letter - Boicourt

Honorable Donald L. Manford  
Missouri Senate, District 8  
Room 425 State Capitol Building  
Jefferson City, Missouri 65101



Dear Senator Manford:

This letter is in response to your request for an official opinion from the Office of the Attorney General concerning the questions (1) whether Section 66.250 is applicable to uniformed and non-uniformed personnel of police departments in fourth class cities within a first class county having a charter form of government; (2) whether a county sheriff in a first class county having a charter form of government is within the classification of a county police department within the meaning of Section 66.250; (3) whether, if the sheriff does not fall within such classification, some other person is the chief law enforcement officer of such a county; and, (4) who has authority to prescribe hours and schedule the training for police officers pursuant to Section 66.250 in first class counties having charter forms of government.

Section 66.250, (Senate Bill No. 389, 76th General Assembly, Second Regular Session) provides:

"1. Any person appointed after September 28, 1971, to serve as a police officer in any police department in any county of the first class having a charter form of government shall, if he has not heretofore completed the training required by this subsection, within six months from the date of the appointment, cause to be filed with the prosecuting attorney of the county proof that he

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has satisfactorily completed a law enforcement officer training course conducted by the Federal Bureau of Investigation National Academy or the Southern Police Institute of Louisville, Kentucky, or a training course with a minimum of six hundred hours of instruction conducted by the county police department alone or in cooperation with any municipal police department authorized by law to operate police training courses, the state highway patrol, or any accredited course for police officers approved by such county police department; provided that any person who has successfully completed a basic police recruit training course conducted by the St. Louis County and Municipal Police Training Academy, the City of St. Louis Police Academy or the Kansas City Police Academy, or who has eight continuous years' of service and experience as a full-time police officer, shall have fulfilled the requirements of this law.

"2. Any person so appointed who fails to comply with the provisions of this section within the six months' period shall not thereafter receive any compensation nor shall he be authorized to act as a police officer until he has complied.

"3. The chief executive officer of each police department shall be responsible for the enforcement of this section, and shall notify the prosecuting attorney of the county of the appointment of any new officer not later than five days after the date of the appointment.

"4. Any person who willfully violates any of the provisions of this section is guilty of a misdemeanor and, upon conviction, shall be punished as provided by law."

You have inquired whether this section applies to the personnel of municipal police departments in Jackson County. Jackson County is a first class county and, effective January 1, 1973, became a first class county with a charter form of government.

You will note that language of Section 66.250 requires "[a]ny person appointed . . . to serve as a police officer in any police



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department in any county of the first class having a charter form of government shall . . . cause to be filed . . . proof that he has satisfactorily completed a law enforcement officer training course . . ." We have concluded that the uniform and non-uniform personnel of police departments of cities of the fourth class within Jackson County fall within the language of Section 66.250 because that language broadly specifies that the training provisions thereof applies to "any police department in any county of the first class having a charter form of government . . ."

In response to the second portion of your opinion request inquiring whether the sheriff's department of Jackson County falls under the statutory classification of a "county police department" within the language of Section 66.250, you will find enclosed Attorney General's Opinion No. 126, addressed to Senator Jack E. Gant on October 11, 1972. We specifically refer you to the following language located at pages 2-3 of that opinion:

"St. Louis County has its own police department which fulfills the police requirement for St. Louis County, State on Inf. Dalton ex rel. Shepley v. Gamble, 280 S.W.2d 656 (Mo. 1955) whereas the police function for Jackson County will be provided by the sheriff's office under Article VII of the Constitutional Home Rule Charter which authorizes the election of a sheriff and the appointment of officers by him. Thus, whether such police function is fulfilled by the sheriff's office or by the county police department makes no difference in the premises since both are 'police departments' in our view within the language of present Section 66.250 which broadly includes 'any police department in any county of the first class having a charter form of government.'"

The final inquiry included in your opinion request concerns who has authority to prescribe the hours and schedule the training necessary to satisfy the requirements of Section 66.250. The statute requires completion of

". . . a law enforcement officer training course conducted by the Federal Bureau of Investigation National Academy or the Southern Police Institute of Louisville, Kentucky, or a training course with a minimum of six hundred hours of instruction conducted by the county police department alone



Honorable Donald L. Manford

or in cooperation with any municipal police department authorized by law to operate police training courses, the state highway patrol, or any accredited course for police officers approved by such county police department; provided that any person who has successfully completed a basic police recruit training course conducted by the St. Louis County and Municipal Police Training Academy, the City of St. Louis Police Academy or the Kansas City Police Academy, or who has eight continuous years' of service and experience as a full-time police officer, shall have fulfilled the requirements of this law."

The hours of attendance and schedules of an appointed police officer in a first class charter county are set by the person in charge of such police force in each governmental entity which itself conducts a police training course authorized by law if the officer attends such course. The hours of attendance and schedules of such an officer taking a course not conducted by such governmental entity are determined by the person in charge of the training course.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 126  
10/11/72, Gant

Op 120-97 to Manfred

February 15, 1973

Mr. Ralph Martin  
Prosecuting Attorney  
Jackson County Courthouse  
Kansas City, Missouri 64106

Dear Ralph:

Please find enclosed a recent Attorney General's Opinion concerning the application of Section 66.250, RSMo, to Jackson County. At present, this office is in the process of drafting an opinion relating to other aspects of Section 66.250 to Jackson County. This opinion is being prepared upon the request of the Honorable Donald Manford. I have requested that a copy of this opinion be directed to you upon its issuance.

Best personal regards.

Very truly yours,

G. Michael O'Neal  
Chief Counsel, Criminal Division

dl

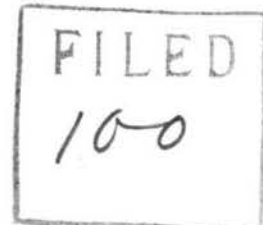
Enclosure

bcc: Marge McGrath ✓

February 13, 1973 ,

OPINION LETTER NO. 100

Mr. James E. Riney, Chairman  
State Tax Commission  
Jefferson State Office Building  
Jefferson City, Missouri 65101



Dear Mr. Riney:

This is in response to your request for an opinion as to the authority of the state of Missouri to levy a corporation franchise tax under the provisions of Chapter 147, RSMo 1969, against national banks operating in this state.

Title 12, Section 548, U.S.C.A., effective January 1, 1972, provides:

"For the purpose of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located."

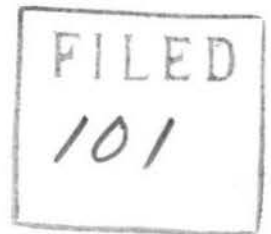
Inasmuch as the intent of Congress in enacting such section was to put the national banks on equal footing with state banks, the national banks are subject to the corporation franchise tax as set forth in Chapter 147 in the same manner and with like effect as state banks.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

March 22, 1973

OPINION LETTER NO. 101  
Answer by letter-Mansur



Honorable Earl L. Schlef  
Representative, District 60  
Room 302, Capitol Building  
Jefferson City, Missouri 65101

Dear Representative Schlef:

This letter is in response to your request for an opinion from this office as follows:

"1. May a fourth class city acquire ground for a city public park adjoining the city limits and within three miles of the city, as provided in Section 79.390 RSMO 1969, when the ground lies within the boundaries of another fourth class city?

"2. If a fourth class city may acquire such ground - either by purchase or donation - may it then enforce its own ordinances and rules and regulations within the park, or is it necessary for the city to contract with the adjoining city within whose boundaries the park-ground is located?"

The first question submitted is whether a fourth class city may acquire ground for a city public park when the grounds lie within the boundaries of another fourth class city.

You refer to Section 79.390, RSMo 1969, which provides as follows:

"The board of aldermen may establish, alter and change the channel of watercourses, and

Honorable Earl L. Schlef

wall then and cover then over, and prevent obstructions thereon, and may establish, make and regulate public wells, cisterns and reservoirs of water, and provide for filling the same. The board of aldermen may purchase grounds and erect and establish market houses and marketplaces, and regulate and govern the same, and also contract with any person or persons, association or corporation, for the erection, maintenance and regulation of market houses, and marketplaces, on such terms and conditions and in such manner as the board of aldermen may prescribe. They may also provide for the erection, purchase or renting of the city hall, workhouse, houses of correction, prisons, engine houses, and any and all other necessary buildings for the city, and may sell, lease, abolish or otherwise dispose of the same, and may enclose, improve, regulate, purchase or sell all public parks or other public grounds belonging to the city, and may purchase and hold grounds for public parks within the city, or within three miles thereof."

Under this statute a fourth class city may purchase and hold grounds for public parks within the city, or within three miles thereof. Under the facts you submit, the location of the ground in question comes within this statute. The question now arises whether the city may purchase this ground due to the fact that it is within the boundaries of another fourth class city.

We have been unable to find any court decision in this state in which an issue similar to this has been decided.

Section 71.015, RSMo, which applies to all cities and towns in the state, prohibits any city to annex territory within the boundaries of another incorporated city. *City of Olivette v. Graeler*, 338 S.W.2d 827 (Mo. 1960).

In *Wellston Fire Protection District of St. Louis County v. State Bank and Trust Company of Wellston*, 282 S.W.2d 171 (St.L.Ct. App. 1955), the question before the court was whether the Wellston Fire Protection District, which included the cities of Wellston and other incorporated cities as well as unincorporated areas in St. Louis County or the city of Wellston, has the authority to regulate by ordinance the construction and building regulations within the city of Wellston. The statutes providing for the organization of fire protection districts expressly authorized such districts

Honorable Earl L. Schlef

to include all or any portion of an incorporated city. The statutes providing for the organization of fire protection districts gave the fire protection district power and authority to adopt and amend bylaws and regulations for fire protection and fire prevention ordinances and to exercise all rights and powers necessary or incidental to or implied from the specific powers granted. The statutes governing cities of the third class such as Wellston expressly authorized such cities to promulgate rules and regulations for fire prevention. In other words, the same power and authority was vested in the fire protection district as was vested in the city of Wellston in promulgating rules and regulations for fire preventions. The statutes providing for the formation of fire protection districts were enacted after the statutes granting cities of the third class authority to regulate the construction of buildings for fire protection.

The court stated the primary rule of statutory construction is to determine the intent of the legislature in enacting the statute. In discussing this question the court stated, l.c. 175-176:

"This brings us to the crux of the case, viz.: In providing a statutory plan for the establishment of fire protection districts and in conferring upon such districts the right to exercise police power, was it the intention of the Legislature to withdraw identical power and authority previously granted by it from municipalities which become a part of a fire protection district? Or was it the intention to permit both the city and district to exercise police power for the purpose of accomplishing the same objective? We find the answer to the second query in McQuillen, Municipal Corporations, where it is said:

'It is firmly established that there cannot be at the same time, within the same territory, two distinct municipal corporations, exercising the same powers, jurisdiction, and privileges. This rule does not rest on any theory of constitutional limitation, but instead on the practical consideration that intolerable confusion instead of good government almost inevitably would attain in a territory in which two municipal corporations of like kind and powers attempted to function coincidentally.'

Honorable Earl L. Schlef

(McQuillen, Municipal Corporations,  
3rd Edition, Volume 2, Section 7.08,  
pages 269 and 270).

Quite obviously if the city and district possessed equal authority with respect to regulating and controlling the construction of buildings for the purpose of preventing fires and protecting persons and property therefrom, a situation could result leading to 'intolerable confusion'. If the regulations of each dealing with requirements coincided there would be no room for confusion. But, should the two, each prompted by a sincere desire to provide protection from the hazards of fire, see fit to prescribe different requirements, making compliance with both impossible, in what predicament would the prospective builder find himself? We cannot believe the Legislature intended that a construction should be placed upon its action as reflected by the adoption of the fire protection statute that would lead to such an unjust, absurd and unreasonable result. And it is our duty to prevent such from occurring. *Laclede Gas Co. v. City of St. Louis*, *supra*; *Union Electric Co. v. Morris*, *supra*."

Under Section 79.390, *supra*, a city of the fourth class is given express authority to enclose, improve or regulate all public parks or other public grounds belonging to the city. If one city is permitted to acquire land within the boundaries of another incorporated municipality, a conflict would arise as to which city would have jurisdiction over the property which would result in an intolerable confusion over the ordinances governing such property and police protection of such property. We do not believe that it was the intent of the legislature in enacting Section 79.390, *supra*, authorizing a city of the fourth class to purchase and hold grounds for public parks, that this would include grounds within another incorporated city. We do not believe it was intended by this statute to allow one city to purchase real estate in another city over which it would not have control as hereinafter discussed.

Your second question asks whether a fourth class city may enforce its own ordinances on property it owns which is located in another municipality. It is our opinion that the city within whose boundaries the park ground is located would have exclusive jurisdiction to enact ordinances with regard to police protection and all other general ordinances of the city in the same manner and to



Honorable Earl L. Schlef

the extent it has over other property within the city boundaries. Bredeck v. Board of Education of City of St. Louis, 213 S.W.2d 889 (St.L.Ct.App. 1948).

Section 79.010, RSMo, authorizes any city of the fourth class to incorporate and to receive and hold property, both real and personal, within such city and may purchase, receive and hold real estate within or without such city for the burial of the dead, and may purchase, hold, lease, sell or otherwise dispose of any property, real or personal, it now owns or may hereafter acquire and may receive bequests, gifts and donations of all kinds of property.

It is our view that under this statute a city of the fourth class may accept property by bequest, gift or donation. This statute is silent as to whether property donated or bequeathed to a city must be within the corporate limits or whether such property can be beyond the corporate limits or within the corporate limits of another city.

There is a distinction to be made between the authority of a municipality to purchase property and its authority to receive property by gift, devise or donation.

In Kennedy v. City of Nevada, 222 Mo.App. 459 (K.C.Ct.App. 1926), the question before the court was whether the city of Nevada had authority to purchase property within its corporate limits for the purpose of operating a tourist camp solely for the accommodation of transients who were passing through the city. The city of Nevada was a third class city and governed by the statutes governing third class cities. However, such statutes that were construed in this case are similar to the statutes now governing cities of the fourth class. In discussing the question of the authority of a city to purchase property or its authority to receive property as a gift, the court stated, l.c. 465-466:

"The right of a municipality to acquire property is given by paragraph 33 of section 1692 of the Revised Statutes, in these words: 'To acquire by purchase, or otherwise, and to hold real estate, or any interest therein, . . . for the use of the corporation, and to sell or lease the same.' Here is specific mention of the purposes for which land may be acquired. The controlling idea is that the property must be for the use of the corporation.'

"We do not say that the Legislature has no power to authorize cities of the third class

Honorable Earl L. Schlef

to acquire and hold property for other than strictly municipal purposes. It has been held that even under the common law land may be given or devised to the city or the city may obtain title by adverse possession, and the city may lawfully acquire title thereto although the land may not be wanted for municipal purposes, yet the city may acquire it for the reason that it may be applied by sale or lease to the alleviation of municipal burdens. [New Shoreham v. Ball, 14 R. I. 566.] And there is no doubt but that section 8206, Revised Statutes 1919, gives authority to cities of the third class to 'receive bequests, gifts and donations of all kinds of property.'

"By the immemorial usage of the country it appears to have been recognized as an incident to the corporate powers of municipal corporations that they may purchase and hold property, both real and personal. So also a municipal corporation has an implied power to receive a gift of real estate for any corporate purpose. While a municipal corporation would of course have no power to purchase with the public funds land or other property except for such public purposes as it was authorized to expend money for by its charter, it is well settled that it may hold real estate which is not devoted or intended to be devoted to any public purpose when such property has come to it in a lawful manner, as by gift or devise or has ceased to be used for the public purpose for which it was originally acquired.' [19 R. C. L., pp. 770, 771.] (Italics ours.)

"A city can purchase property for municipal purposes and after it has become no longer necessary to be used for that purpose may hold it, and it may be that in holding all property that comes to it in a legal manner, it can, as an incident to the ownership, look after the same and be liable for the maintenance of a nuisance upon it. But that is not this case. Here the city was guilty of a wholly ultra vires act in attempting to purchase the land in question for a tourist camp, and under the holding of Markley v. Mineral City, supra, acquired no title to it."

Honorable Earl L. Schlef

It is our view that even though a city of the fourth class does not have statutory authority to purchase property within the corporate limits of another city, it does have authority to receive property as a gift or donation even though such property may lie within the corporate limits of another city. However, it is our view that such property would be within the jurisdiction of the municipality in which it is located in the same manner and to the same extent as other property privately owned would be.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

February 13, 1973

OPINION LETTER NO. 102  
Answer by Letter - Klaffenbach

Honorable C. F. Cline  
State Representative, District 159  
Room 414, State Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Cline:

This letter is in response to your question asking whether House Bill No. 324 of the 77th General Assembly is constitutional.

The introduced version of the bill which we have studied makes it "unlawful for any person, firm or corporation acting as a processor or distributor of farm products [as therein defined] to own, control, operate or in any manner engage in farming or agricultural production."

We have not been furnished with any legal memoranda concerning this bill nor do we find any court decisions directly in point.

The general rule with respect to such regulation is stated concisely in 3 Am.Jur.2d, Agriculture, §34, as follows:

"It is well settled that the federal government through its constitutional powers over commerce, and the states in the exercise of the police power in the interest of the public health, safety, and welfare, may, within constitutional limits, enact and enforce reasonable and appropriate regulations affecting agriculture, either directly for the protection of the public or indirectly so, through regulations which foster the improvement of the agricultural industry."

Honorable C. F. Cline

While there are patent typographical mistakes in the bill we are unable to detect any obvious constitutional infirmities.

We do not believe that we should attempt to determine, in the abstract, whether or not the bill presents any conflict with the federal government's right to regulate interstate commerce.

In view of the fact that a prompt response to your letter is required we have not undertaken to make a detailed and time consuming analysis of the questions involved.

Very truly yours,

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

March 27, 1973

OPINION LETTER NO. 103

Honorable Edna Eads  
State Representative, District 128  
Room 203 State Capitol Building  
Jefferson City, Missouri 65101

Dear Mrs. Eads:

This letter is in response to your request for an opinion on the following question:

"Can a city administration temporarily suspend a city sales tax without complete abolition?"

The letters attached to your opinion request state that the administration of the City of Flat River does not desire to abolish its city sales tax entirely, but that some citizens of that city have proposed that the tax be suspended temporarily until such time as other cities in the area may decide to enact similar taxes.

In our Opinion No. 39, January 3, 1973, issued to the Honorable Edna Eads, a copy of which is attached hereto, we held that the governing body of a city may abolish a city sales tax previously imposed as provided in Sections 94.500 to 94.570, RSMo 1969, by repealing the ordinance imposing the tax, without a subsequent vote of the qualified electors on the question of abolition. The issue herein is whether such a procedure can also suffice to effect a temporary suspension of such a city sales tax.

The first issue posed by your question is whether a municipal ordinance may be suspended for a limited period of time by any means. No provision of the Revised Statutes of Missouri explicitly permits the temporary suspension of municipal ordinances.

Honorable Edna Eads

However, "[t]he view has been taken that the temporary suspension of operation of an ordinance may be effected by the enactment of another ordinance providing for such suspension." 56 Am.Jur.2d, Municipal Corporations, §409, p. 451. We conclude initially, then, that it is possible for a city sales tax ordinance to be suspended temporarily without complete abolition.

The second issue implicit in your question is the manner in which such a suspension of the city sales tax ordinance may be accomplished. It has been stated that:

"The operation of an ordinance may for a time be suspended by another ordinance, but it cannot be suspended by a mere resolution or by an act of the council of less dignity than the ordinance itself. Thus, the council has no authority to set aside or disregard a duly enacted ordinance except in some manner prescribed by law. Likewise, the mayor or any other municipal officer or board has no power to suspend the operation of an ordinance which contains no provision authorizing them to do so." 62 C.J.S., Municipal Corporations, §439, at p. 840.

In the case of In re Condemnation of Property for Park in City of St. Joseph, 263 S.W. 97 (Mo. banc 1924), the court said, l.c. 102:

". . . Having been enacted and approved, it [an ordinance passed by referendum] is nevertheless equally subject to the legislative will as to amendment or repeal as though it had not been referred. . . ." (Emphasis added)

The temporary suspension of an ordinance, if limited in duration to a specified period of time, is a form of amendment of that ordinance. We conclude that this type of limited temporary suspension of a city sales tax may be effected by the governing body of a city which has enacted such a tax.

However, an indefinite suspension lacking a date of automatic termination, or requiring further legislative action to reinstate the operation of the ordinance, is the equivalent of the repeal of the ordinance. But, while the governing body of a city may repeal a city sales tax ordinance without a vote of the people, it clearly cannot enact a city sales tax ordinance in any manner other than that set forth in Section 94.510.1, RSMo 1969, providing for approval by the qualified voters of the city before a city sales tax can be levied.



Honorable Edna Eads

We conclude that the reenactment of a city sales tax ordinance, after it has once been repealed, requires another vote of the people as contemplated by Section 94.510.1. Upon repeal, the initial ordinance and the people's approval of it become a nullity. To permit the governing body of a city to achieve by an indefinite ordinance of suspension, followed by some subsequent and independently determined lifting of that suspension, what it could not do by separate ordinances of repeal and reenactment, would vitiate the requirement of a referendum in Section 94.510.1. We conclude that a city sales tax ordinance can only be suspended by an ordinance which limits the term of the suspension to a specified duration and automatically reinstates the tax at the expiration of that period.

Very truly yours,



JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 39  
1/3/73, Eads

SCHOOLS:  
TEACHERS:  
TEACHER TENURE:  
TEACHERS' CERTIFICATES:

(1) A probationary and a permanent teacher may be sued by a six-director school district as defined in Section 160.011(12), RSMo 1969, for damages which the school district

can prove resulted from the teacher's unjustified refusal to perform the agreed upon services provided for in the teacher's contract. (2) Pursuant to Sections 168.114 through 168.120, a permanent teacher's indefinite contract could be terminated by a school district if a teacher unjustifiably refuses to perform the services called for by the teacher's employment contract with the school district. (3) A teacher's teaching certificate could be revoked by the authority which issued the certificate upon satisfactory proof that the teacher has unjustifiably failed to perform the services called for by his employment agreement and that, therefore, the teacher has neglected his duty and/or has annulled his contract with the local school board without the consent of the majority of the members of the board which is a party to the contract as provided in Section 168.071, RSMo 1969.

OPINION NO. 104

October 2, 1973

Honorable Richard J. DeCoster  
Representative, District 1  
Box 222  
Canton, Missouri 63435



Dear Representative DeCoster:

This official opinion is issued in response to your request for a ruling on whether (1) Missouri law permits a school district to sue an employee under contract to render personal services for damages for breach of contract; (2) unjustified failure of a teacher to carry out the terms of a contract of employment with a school district would terminate the teacher's rights under the Teacher Tenure Act (Sections 168.102 to 168.130, RSMo 1969); (3) failure of a teacher to honor a valid contract with a school district would constitute grounds for revocation of his teaching certificate (Section 168.071, RSMo 1969); and (4) willful defiance of a valid court order would be grounds for termination of tenure or for revocation of a teacher's certificate under our statutes.

No facts have been furnished in connection with your request. Therefore, we have had to make certain assumptions, which appear throughout this opinion, in order to answer your questions.

Honorable Richard J. DeCoster

As used in this opinion, "school district" refers to "any school district which has six directors and includes urban districts regardless of the number of directors an urban district may have." Section 160.011(12), RSMo 1969. We have not used as a basis for this opinion the facts surrounding the teachers' strike in the St. Louis School District because it is the subject of litigation. Thus, a "metropolitan school district," as defined in Section 160.011(8), is not considered in this opinion. For the same reason, we are not passing on the question of whether a teacher who strikes has breached his teaching contract, thereby subjecting himself to a breach of contract action and loss of rights under the Teacher Tenure Act.

If a teacher breaches a contract with a district, could he be sued for damages?

We assume that a valid employment contract existed between the teacher and the school district, and that the teacher arbitrarily and without justification refused to perform the services called for by the contract. Under general principles of contract law, the teacher would thereby have breached his employment contract with the district. See 17 Am.Jur.2d., Contracts, Section 441, and Cuba Consolidated School Dist. No. 1. v. Fox, 79 S.W.2d 772 (Spr.Ct.App. 1935).

Assuming that a teacher has breached his contract with the school district, the teacher could be sued by the district for monetary damages arising out of the breach. However, to recover any damages, the school district would be required to prove the amount of monetary harm caused by the teacher's actions. 5 Corbin, Contracts, Section 1002 (1964). In 3A Corbin, Contracts, Section 677 (1960), the author commented on whether damages can be recovered in this situation:

"The effect of absence from work may depend upon whether the employer can get an efficient substitute on a temporary basis. . . . School districts generally have a list of available substitute teachers who are ready to fill, on a temporary basis, the place of an absent teacher. . . ."

If a substitute can be obtained for the same salary as the defaulting teacher, the district could have difficulty in establishing that it was monetarily damaged. On the other hand, if the district has to pay a substitute more money to perform the same services than was paid the defaulting teacher, the difference between the two salaries might form the basis for a money judgment against the defaulting teacher.

Honorable Richard J. DeCoster

Could failure by a permanent teacher to render teaching services pursuant to an indefinite contract result in termination of the permanent teacher's indefinite contract?

---

If we assume that a permanent teacher has arbitrarily and without justification refused to perform the services called for by his contract, Section 168.114, RSMo 1969, provides that such action could lead to termination of the teacher's permanent contract with the district. Several of the causes for termination of an indefinite contract provided in Section 168.114 might apply, depending upon the factual situation:

"(3) Incompetency, inefficiency or insubordination in line of duty;

"(4) Willful or persistent violation of, or failure to obey, the school laws of the state or the published regulations of the board of education of the school district employing him;

"(5) Excessive or unreasonable absence from performance of duties; . . ."

In an earlier opinion (No. 413, Waters, November 25, 1969), we defined "insubordination" as used in Section 168.114(3), RSMo 1969, to mean:

"A teacher's willful, intentional refusal or neglect to obey an express or implied command, instruction, order or rule of the teacher's employing school board, which command, instruction, order or rule is known to the teacher, is reasonable in nature and is given by and with proper authority." Opinion No. 413 at pp. 6-7.

To accomplish termination of an indefinite contract, the board would have to follow the termination procedure set forth in Sections 168.116 through 168.120, RSMo 1969.

Would failure to perform the services called for by an employment contract revoke a teacher's certificate to teach?

Honorable Richard J. DeCoster

By "failure to honor a valid contract," we assume that you are referring to a situation where the teacher, whether a probationary or a permanent teacher, has unjustifiably refused to perform the services called for by the contract with the school district. Pursuant to Section 168.071, RSMo 1969, the authority which issued a teaching certificate may revoke it upon satisfactory proof of "neglect of duty" or "the annulling of a written contract with the local school board without the consent of a majority of the members of the board which is a party to the contract."

Would willful defiance of a court order  
terminate a teacher's tenure or revoke his  
teaching certificate?

We decline to answer this question because the facts we would have to assume as the basis for an answer would be essentially the facts of the St. Louis teachers' strike. As previously indicated, that matter is still the subject of litigation and, therefore, it would not be appropriate for this office to render an opinion on this question.

#### CONCLUSION

Therefore, it is the conclusion of this office that (1) a probationary or a permanent teacher may be sued by a six-director school district as defined in Section 160.011(12), RSMo 1969, for damages which the school district can prove resulted from the teacher's unjustified refusal to perform the agreed upon services provided for in the teacher's contract; (2) pursuant to Sections 168.114 through 168.120, a permanent teacher's indefinite contract could be terminated by a school district if a teacher unjustifiably refuses to perform the services called for by the teacher's employment contract with the school district; and (3) a teacher's teaching certificate could be revoked by the authority which issued the certificate upon satisfactory proof that the teacher has unjustifiably failed to perform the services called for by his employment agreement and that, therefore, the teacher has neglected his duty and/or has annulled his contract with the local school board without the consent of the majority of the members of the board which is a party to the contract as provided in Section 168.071, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my assistant, D. Brook Bartlett.

Yours very truly,

  
JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 413, 11-25-69, Waters



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

March 6, 1973

OPINION LETTER NO. 105

Herbert R. Domke, M.D.  
Director, Division of Health  
Broadway State Office Building  
Jefferson City, Missouri 65101

Dear Dr. Domke:

This is in reply to your request that we give legal approval to the attached form of application for license to operate a boarding house for the aged that the Division of Health proposes to utilize in the administration of the Boarding House Licensing Law, House Bill No. 1165, 76th General Assembly.

The form which you attached to the request appears to be legally sufficient and not in contravention of the enabling law, except in the following particulars:

- (1) The Boarding House Law requires the applicant to state the location of the boarding house (Section 3.1.(2)). It does not require the applicant to designate a name for the boarding house, as does the form.
- (2) The law requires the application to contain a statement that the boarding house conforms to the fire, housing and general sanitation regulations and zoning classifications of the proposed location (Section 3.1.(5)). It does not require the statement to be made by a person other than the applicant, as does the form.
- (3) The law does not require the applicant to state or certify on the application

Herbert R. Domke, M.D.

that neither he, nor any member or officer of the firm, partnership or association constituting the applicant, has ever been convicted of a felony. The form, in making this requirement, exceeds those of the law.

Following the applicant's signature and the notary's acknowledgement on the form, we believe it would be appropriate to set forth verbatim Section 2 (identifying April 2, 1973, as the applicable date), Section 4, and Section 7 of the law.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

Enclosure: Application form



COSTS:  
PROBATE COURT:  
CIRCUIT CLERKS:

The clerk of the circuit court is not entitled to charge the \$25 fee for each civil case instituted in circuit court in a probate case heard by the circuit court because of disqualification of the probate judge.

OPINION NO. 106

March 21, 1973

Honorable Gary Wallace  
Assistant Prosecuting Attorney  
Shelby County Courthouse  
Shelbyville, Missouri 63469



Dear Mr. Wallace:

This opinion is in response to your question asking:

"Does the provision of Section 483.540 VAMS (1972), relating to Clerks of Circuit Courts, which provides for a fee of \$25.00 for 'each civil case instituted in that court' apply to cases instituted in Probate Court and certified to the Circuit Court upon disqualification of the Probate Judge."

Section 483.540 (H.C.S.S.B. No. 496, 76th General Assembly) provides:

"1. The clerks of the circuit courts and of the courts of common pleas, shall charge and collect in all civil proceedings the following fees to aid in defraying the expenses of judicial administration:

Each civil case instituted in that court. . . . .	\$25.00
Each additional summons issued for additional defendants. . . . .	1.00
Each alias summons issued. . . . .	1.00
Each pluralis summons issued. . . . .	1.00
Each third party defendant issued. . . . .	1.00
Each appeal from municipal courts. . . . .	20.00
Each appeal from magistrate courts. . . . .	20.00

Honorable Gary Wallace

In circuits where there is more than one section or division of the court, costs in any case shall be charged in only the division or divisions in which the case may be carried.

"2. Fifty percent of all fees collected shall be paid into the county treasury in the manner provided in section 483.560 or in the case of the city of St. Louis, paid into the city treasury in the manner provided in section 483.545, and the remaining fifty percent of the fees shall be paid to the director of revenue in the manner provided in section 483.541."

We note by comparison that the pertinent provision of Section 483.540, RSMo 1969, which was repealed provided "Each civil case, with one defendant . . . . \$12.00." Therefore, it is clear that the language "instituted in that court" was added in lieu of the language "with one defendant."

The provision respecting disqualification of the probate judge and certification to the circuit court is Section 472.060, RSMo, which provides:

"No judge of probate shall sit in a case in which he is interested, or in which he is biased or prejudiced against any interested party, or in which he has been counsel or a material witness, or when he is related to either party, or in the determination of any cause or proceeding in the administration and settlement of any estate of which he has been executor, administrator or guardian, when any party in interest objects in writing, verified by affidavit; and when the objections are made, the cause shall be certified to the circuit court, which shall hear and determine same; and the clerk of the circuit court shall deliver to the probate court a full and complete transcript of the judgment, order or decree made in the cause, which shall be kept with the papers in said office pertaining to said cause."

On filing of the proper application, the probate judge is without authority to proceed other than to certify the cause to the

Honorable Gary Wallace

circuit court. State ex rel. Musser v. Dahms, 458 S.W.2d 865 (K.C. Ct.App. 1970). The circuit court acquires jurisdiction as a circuit court although the proceeding retains its probate character and the judgment is the judgment of the circuit court and not of the probate court. In re Schwidde's Estate, 363 S.W.2d 585 (Mo. 1963). And, as to substantive matters, the circuit court is governed by the laws of administration or guardianship; but as to procedural matter, it is subject to the rules of civil procedure. In re Boeving's Estate, 388 S.W.2d 40 (Spr.Ct.App. 1965).

In our Opinion No. 33 dated February 11, 1970, to Lauderdale (copy enclosed), we considered many of the numerous questions which arose out of the repeal of Section 483.540, RSMo 1959, and the enactment of the flat fee provisions in lieu of the itemized fee allowances. We concluded therein that the legislature has withdrawn the authority of such circuit clerks to charge for certain services with some exceptions and that such clerks still have the obligation to perform such services but have no right to levy charges not expressly granted by statute.

It has long been the rule that the entire subject of costs in both civil and criminal cases is a matter of statutory enactment and such statutes must be strictly construed. Ring v. Charles Vogel Paint & Glass Company, 46 Mo.App. 374 (St.L.Ct.App. 1891). While it is possible that this rule might not have the force today that it had at a time or in circumstances where the fee inured to the personal benefit of the claimant, which is not the case in the premises, the fact remains that although we are bound to interpret the legislative intent we cannot read into a statute an intent contrary to the legislative intent made evident by phraseology. City of St. Louis v. Crowe, 376 S.W.2d 185 (Mo. 1964). Likewise, it is recognized that the courts in interpreting statutes have nothing to do with the wisdom or propriety of the statute, such matters being for the legislature. State v. Knapp, 33 S.W.2d 891 (Mo. 1930).

With the foregoing in mind, we note that the precise language of Section 483.540, as amended, clearly restricts the \$25 fee to "[e]ach civil case instituted in that court." We find no applicable Missouri cases with respect to the word "institute"; however, we view it similar to the word "commence" which has been held to mean when the petition is filed and the summons delivered to the sheriff. Emanuel v. Richards, 426 S.W.2d 716 (St.L.Ct.App. 1968). Other jurisdictions have held that "institute" when applied to legal proceedings signifies the commencement of the proceedings. "Institute" means to begin, to commence, to initiate, to originate. Wales v. Tax Commission, 412 P.2d 472 (Ariz. banc 1966); Kennie v. City of Westbrook, 254 A.2d 39 (Me. 1969); Rucks-Brandt Const. Co. v. Price, 23 P.2d 690 (Okla. 1933).

Honorable Gary Wallace

In sum, it seems clear that if there were no cause "instituted" in the probate court, there would be no grounds for removal of the probate judge as the latter must necessarily come after the cause or claim is instituted.

While it is our view that the legislature omitted provisions for payment to the circuit clerk in the premises (as also was apparently done with respect to appeals from the probate court), it is also our view that we do not have the right to supply the omission as such is the exclusive province of the legislature.

#### CONCLUSION

It is the opinion of this office that the clerk of the circuit court is not entitled to charge the \$25 fee for each civil case instituted in circuit court in a probate case heard by the circuit court because of disqualification of the probate judge.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 33  
2-11-70, Lauderdale

COUNTIES:

CONSTITUTIONAL CHARTER COUNTIES:

FINANCIAL STATEMENT:

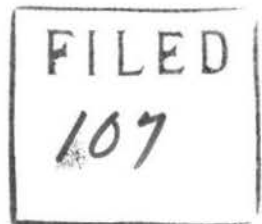
A county of the first class  
with a charter form of govern-  
ment must comply with Section  
50.800, RSMo 1969, relating to

county financial statements, and may not modify the form and con-  
tent of the county financial statement prescribed by that section;  
but such a county may designate appropriate officers or agencies  
to perform the duties which that section otherwise imposes on  
county courts.

OPINION NO. 107

March 9, 1973

Honorable Donald L. Manford  
Missouri Senate, 8th District  
Room 425 Capitol Building  
Jefferson City, Missouri 65101



Dear Senator Manford:

This official opinion is issued in response to your request  
for a ruling on the following question:

"Does a county of the 1st class with a char-  
ter form of government have to comply with  
Sec. 50.800, RSMo 1969, [relating to county  
financial statements] or may that county by  
local ordinance elect not to comply with same  
and not publish such a statement or may said  
county by ordinance modify the form and con-  
tent of said publication contrary to Section  
50.800, RSMo 1969?"

Your opinion request states that Jackson County is not attempting  
to comply with the requirements of this statutory provision.

Article VI, Section 18(a) of the Constitution of Missouri  
1945, provides that:

"Any county having more than 85,000 inhabi-  
tants, according to the census of the United  
States, may frame and adopt and amend a char-  
ter for its own government as provided in  
this article, and upon such adoption shall  
be a body corporate and politic."

Honorable Donald L. Manford

Section 18(b) provides that:

"The charter shall provide for its amendment, for the form of the county government, the number, kinds, manner of selection, terms of office and salaries of the county officers, and for the exercise of all powers and duties of counties and county officers prescribed by the Constitution and laws of the state."  
(Emphasis added)

These constitutional provisions were interpreted in the case of State on Inf. Dalton ex rel. Shepley v. Gamble, 280 S.W.2d 656 (Mo. banc 1955). The court stated that a county:

". . . regardless of its charter, remains a legal subdivision of the state. . . . As such, it is charged with the performance of the state functions just as other counties are. Section 18(b) . . . expressly requires that the charter must provide 'for the exercise of all powers and duties of counties and county officers prescribed by the constitution and laws of the state.'" (280 S.W.2d at 659)

Section 50.800.1, RSMo 1969, provides that:

"On or before the first Monday in March of each year, the county court of each county shall prepare and publish in some newspaper of general circulation published in the county, if there is one, and if not by notices posted in at least ten places in the county, a detailed financial statement of the county for the year ending December thirty-first, preceding."

[The remainder of Section 50.800 and its companion, Section 50.810, RSMo Supp. 1971, describe the contents and manner of publication of the county financial statement.] This statute refers to "each county" and makes no exception for counties of the first class with a charter form of government.

It is true that the statute places responsibility for the preparation of the county financial statement upon the county court of each county, and that Jackson County has replaced its county court by a county legislature under the terms of its charter. However, in the Gamble case, supra, the court stated (with respect to the duties mandated by state law to county sheriffs) that:



Honorable Donald L. Manford

" . . . provision must be made by the charter county for the performance of the duties enjoined upon sheriffs by our statutes, but the county has the choice as to what officer or agency will be designated to perform the duties. . . ." (280 S.W.2d at 660)

Again, in Hellman v. St. Louis County, 302 S.W.2d 911 (Mo. 1957), the court stated:

" . . . We know of no constitutional or statutory provision that a charter county must exercise the powers and duties enjoined upon it by the constitution in precisely the same manner as prescribed by the general law of the state. . . . Little purpose would be served in authorizing the adoption of charters of local self-government in the more populous counties if such counties could not adopt reasonable means and methods of carrying out their governmental functions in such a manner as to meet the peculiar needs of such counties. . . ." (302 S.W.2d at 916)

We conclude that a county of the first class with a charter form of government must perform the functions mandated by Section 50.800.

However, we find no authorization in either Section 50.800, or Article VI, Section 18 of the Constitution of Missouri 1945, for a county of the first class with a charter form of government to alter the form or substantive content of its county financial statement. We conclude that the county may alter the prescribed statutory form of the statement only insofar as that statement explicitly makes reference to a county court as the agency responsible for its preparation (as in Section 50.800.11, relating to the certificate of the person actually preparing the prescribed information).

#### CONCLUSION

Therefore, it is the opinion of this office that a county of the first class with a charter form of government must comply with Section 50.800, RSMo 1969, relating to county financial statements, and may not modify the form and content of the county financial statement prescribed by that section; but such a county may designate appropriate officers or agencies to perform the duties which that section otherwise imposes on county courts.



Honorable Donald L. Manford

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH  
Attorney General

CRIMINAL LAW:  
PUBLIC DEFENDER:

State public defenders are not prohibited by the provisions of House Bill No. 1314, 76th General Assembly, from employing additional assistants to be paid from federal grant funds for the purpose of defending indigents in juvenile and misdemeanor cases.

OPINION NO. 108

February 23, 1973

Honorable Lawrence J. Lee  
Missouri Senate, 3rd District  
Room 418 State Capitol Building  
Jefferson City, Missouri 65101



Dear Senator Lee:

This opinion is in response to your question asking whether the state public defender of the circuit comprising the City of St. Louis is precluded under the provisions of House Bill No. 1314 of the 76th General Assembly from hiring additional employees funded by the Missouri Law Enforcement Assistance Council for the purpose of defending indigents accused of misdemeanors and indigent juveniles in juvenile cases.

Section 6 of the Bill provides in part:

"1. In any circuit located wholly within a city which is not within a county, the circuit public defender may appoint not more than fifteen assistant public defenders to assist him in his duties. In circuits containing all or a major part of a city having a population of four hundred and fifty thousand but not more than six hundred thousand persons, the circuit public defender may appoint not more than eleven assistant public defenders. In all other circuits having a population of five hundred thousand or more and which have no cities within the county with a population of more than four hundred thousand persons, the circuit public defender may appoint not more than eight assistant defenders. In all other circuits which have a circuit public defender, he may appoint not more than three assistant defenders.

Honorable Lawrence J. Lee

The public defender in any circuit which has a public defender office may employ special assistant public defenders for such periods or purposes as the defender may determine."

Under Section 8 of the Bill, state public defenders have the duty to represent indigent persons upon court order when such persons are charged or detained in connection with a felony or have filed petitions for habeas corpus or other post conviction motions alleging unlawful restraints by public authority, or upon request by such persons charged or detained in connection with a felony.

House Bill No. 1314 was the legislative response to the decision of the Missouri Supreme Court in State v. Green, 470 S.W.2d 571 (Mo. 1971). In Green, the court addressed itself to the demands placed upon the legal profession with respect to the representation of indigents pursuant to the opinion of the United States Supreme Court in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The Missouri Supreme Court said that the "Court, after September 1, 1972, will not compel attorneys of Missouri to discharge alone 'a duty which constitutionally is the burden of the State.'"

The decision of the United States Supreme Court in In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), which decided that juveniles are entitled to representation preceded the enactment of House Bill 1314. However, it was not until June 12, 1972, (or almost concurrently with the approval, June 23, 1972, of the Bill) that the United States Supreme Court decided Argersinger v. Hamlin, \_\_\_ U.S. \_\_\_, 92 S.Ct. \_\_\_, 32 L.Ed.2d 530 (1972). In Argersinger the court held ". . . that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." (Id. 32 L.Ed.2d, at 538).

As a result of the Argersinger decision the ". . . judge can preserve the option of a jail sentence only by offering counsel to any defendant unable to retain counsel on his own . . ." (Id., concurring opinion, at 541). As a further result of decisions of the United States Supreme Court which are summarized in Hendrix v. Lark, 482 S.W.2d 427 (Mo. banc 1972), indigent defendants cannot be jailed for unwillful failure to pay fines and costs. Thus, the end result of these decisions is that if justice is to be meaningful and the interests of society preserved the poor cannot be permitted to escape a jail sentence for lack of counsel and avoid jail for lack of funds with which to pay fines and costs while a person of modest means must suffer exposure to both. However, we will not attempt to detail the numerous considerations involved many of which are obvious and most of which are expressed in the Argersinger case.

Honorable Lawrence J. Lee

It is clear that the same reasons which compelled the Supreme Court of Missouri to make its decision in State v. Green, above, are now expanded and brought to a forceful focus by Argersinger v. Hamlin. Likewise, the same underlying considerations have existed with respect to juveniles since In re Gault, above. We are thus compelled to conclude that the state legislature did not intend to create a state public defender system which lacks the capacity to deal fully with the interests of justice and of society.

Therefore in answer to your question, it is our view that, in the premises, the defender may employ additional assistants, exceeding fifteen if necessary, to be paid from federal grant funds for the defense of indigents in misdemeanor and juvenile cases.

Finally, we point out that the views expressed here are limited to the situation considered respecting public defenders.

#### CONCLUSION

It is the opinion of this office that state public defenders are not prohibited by the provisions of House Bill No. 1314, 76th General Assembly, from employing additional assistants to be paid from federal grant funds for the purpose of defending indigents in juvenile and misdemeanor cases.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

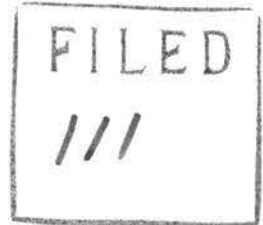
MENTAL HEALTH:

The Division of Mental Health has authority under the provisions of House Committee Substitute for House Bill No. 204, 76th General Assembly, Second Regular Session (Section 202.831) to use Division appropriations for the care of patients in their own homes or in the homes of relatives and that such homes are not required to be licensed under Section 2 of the Bill. The Division has no authority to make payments directly to patients for their care.

OPINION NO. 111

March 19, 1973

Harold P. Robb, M.D., Director  
Division of Mental Health  
722 Jefferson Street  
Jefferson City, Missouri 65101



Dear Dr. Robb:

This opinion is in response to your request in which you ask the following questions:

"Three questions -- re: HB 204, 76th G.A.,  
Second Regular Session

1. Can the Division of Mental Health legally pay for care if a person remains in his natural home or a home of a relative?
2. Is it permissible under this law to pay a patient directly for his care after he has been released from a hospital?
3. Is it required under these sections that the Division license natural homes of parents or relatives if they are utilized to care for patients where payments is made from such appropriations for patient placement?"

H.C.S.H.B. No. 204, 76th General Assembly, Second Regular Session, to which you refer, is an amendment to Section 202.831, RSMo, and provides in part as follows:

"1. The head of a state mental facility, with the consent of the person responsible for the commitment of the patient or of one of the parents, if living, having been first obtained,

Harold P. Robb, M.D.

may place any patient, except those committed as criminally insane, in a licensed boarding, or licensed nursing home or family home upon such terms and conditions as he deems proper when he believes that such family care would benefit the patient. If the patient so placed is ineligible to receive public assistance benefits from the division of welfare, or such benefits are inadequate to meet the costs of such care, the monthly costs may be paid or supplemented out of funds appropriated for that purpose to the division of mental health; but the payment for such care shall not exceed the average per capita cost of maintenance for the prior fiscal year of patients in the state facility from which he is transferred. The payment made by the parent or guardian for such care shall not exceed the amount paid the state hospital.

"2. The division shall arrange for or make inspections and visits in the home in which the patient has been placed, provide adequate medical care, and may, with the consent of the person responsible for the commitment of the patient or of one of the parents, if living, return the patient to the facility or place him in another home when deemed advisable.

"3. The placement of a patient in a licensed boarding or licensed nursing home or family home shall be considered as a conditional release from the facility but shall not relieve the county of the patient's residence or those responsible for the support of a private patient, as the case may be, from the obligations imposed upon them by law for the support and maintenance of the patient if payments are made from funds appropriated to the division of mental health for such care.

"4. The division of welfare through its county welfare offices shall cooperate with the state mental facilities and the division of mental health in locating licensed boarding or licensed nursing homes or family homes, making visits and inspections in such homes, and submitting reports regarding the homes and patients placed therein."



Harold P. Robb, M.D.

Although you have not raised the point in your question, it should first be noted that the placement of a patient in a family home is not dependent upon the question of whether or not he is a private, county or state patient. This is obvious from a reading of subsections 1 and 3 of Section 202.831 as amended. That is, although patients of the facilities of the Division of Mental Health are classified as private, county or state patients under Section 202.863, RSMo, and are charged for their care if they are private patients under Section 202.330, RSMo, the provisions of Section 202.831, with respect to placing such patients in family homes, indicate that funds appropriated to the Division of Mental Health may be used within the limitations of subsection 1 of Section 202.831 for such support and maintenance in such a home whether or not the patient is a county patient or a private patient. However, in such case neither the county nor the persons responsible are relieved from the ultimate liability imposed upon them by law for the care of such patients.

Turning to your first question asking whether the Division of Mental Health can legally pay for the care of a patient in his natural home or the home of a relative, we note that Section 202.831 does not define "family home." We know of no other definition in the laws of this state which would be applicable and it is our view that "family home" refers simply to a family place of abode. In this respect the rule of construction under Section 1.090, RSMo, is that words shall be taken in their plain and ordinary and usual sense unless they are technical words having a technical import. Here the words "family home" have no technical import and can be taken in their ordinary sense. Clearly, however, until the 1967 amendments to Section 202.831, noted below, "family home" meant something other than the patient's own home or a relative's home. The present meaning includes any such home without regard to relationship.

Section 202.831, RSMo 1959, provided in part:

"1. The head of a state mental hospital may place any patient, except those committed as criminally insane, in a suitable boarding, licensed nursing home or family home other than his own home or that of any person related to him within the fourth degree, by consanguinity or affinity upon such terms and conditions as he deems proper when he believes that such family care would benefit the patient. If the patient so placed is ineligible to receive public assistance benefits from the division of welfare, or such benefits are inadequate to



Harold P. Robb, M.D.

meet the costs of such care, the monthly costs may be paid or supplemented out of funds appropriated for that purpose to the division of mental diseases; provided, however, that payment for such care shall not exceed the average per capita cost of maintenance for the prior fiscal year of patients in the state hospital from which he is transferred." (emphasis added)

The portion of the 1959 laws prohibiting placement in the patient's own home or in a relative's home, which we have underscored above, was deleted by the Laws of 1967, p. 295; and as can be seen, no such prohibition was included in the last amendment, H.C.S.H.B. No. 204, which we have quoted in the beginning of this opinion. Therefore, it is obvious that the legislature fully intended to remove any restriction with respect to the placement of the patient in his own home or in the home of any person related to him.

We therefore conclude, in answer to your first question, that the Division of Mental Health can legally pay for care of such a patient even though he is placed in his own home or in the home of a relative.

Your second question asks whether it is permissible to pay a patient directly for his care after he has been released from a hospital. We find no authority for the Division to make direct payments to a patient for his care.

Your third question asks whether the Division of Mental Health must license homes of parents or relatives if such homes are utilized to care for patients where payment is made from Division appropriations for patient placement.

The licensing provisions which are also contained in H.C.S.H.B. No. 204, 76th General Assembly, Second Regular Session, require that the Division of Mental Health ". . . establish a procedure for the licensing of all homes or institutions which accept mentally retarded persons for care, treatment or custody, except those state institutions operated by it. . . ." The Division is further required to promulgate rules with respect to such institutions or homes and to require certain annual license fees.

It is axiomatic that in determining the construction of statutory provisions we must first determine what the legislature intended and avoid a construction which would arrive at an absurd result.

Harold P. Robb, M.D.

Our conclusion in this respect is that the legislature intended that the Division license homes which accept one or more mentally retarded persons and that the word "accept" was intended to limit the licensing requirement to homes accepting unrelated persons for care. We do not believe that the legislature by any means intended that private homes which care for members of the family, in their own normal family setting, should be licensed. Therefore, it is our view that the legislature did not intend to require the licensing of private homes simply because one or more members of the family are retarded.

We conclude, then, in answer to your third question, that the licensing requirements do not apply to natural homes and that the mere fact that appropriations of the Division of Mental Health are used to sustain a patient in his own home or in a relative's home does not mean that the patient is accepted on a commercial basis and the home subject to licensure. However, under subsection 2 of Section 202.831 such homes in which patients are placed by the Division must be inspected by the Division

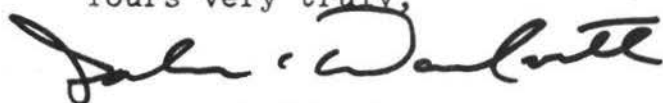
We do not attempt to define what you mean by "relatives" with respect to your reference to placement in a relative's home. In this respect the underscored portion of the 1959 provision of Section 202.831, which referred to relationship within the fourth degree by consanguinity or affinity, would at least provide a guideline in determining whether or not a legal relationship exists so as to exclude such a home from the licensing requirements.

#### CONCLUSION

It is the opinion of this office that the Division of Mental Health has authority under the provisions of House Committee Substitute for House Bill No. 204, 76th General Assembly, Second Regular Session (Section 202.831) to use Division appropriations for the care of patients in their own homes or in the homes of relatives and that such homes are not required to be licensed under Section 2 of the Bill. The Division has no authority to make payments directly to patients for their care.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

MILK:  
FARMERS:  
DAIRIES:  
AGRICULTURE:

Section 4 of House Bill No. 1280 prohibits a dairy farmer from selling raw milk to the general public from a distribution center set up by the dairy farmer and located away from his farm premises.

OPINION NO. 113

March 29, 1973

Honorable R. Wendell Bailey  
Representative, District 152  
Room 100-C, State Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Bailey:

This is in response to your request for an opinion as to whether or not Section 4 of House Bill No. 1280, 76th General Assembly, prohibits a dairy farmer from selling raw milk to the general public from a distribution center set up by the dairy farmer at a location other than his farm premises.

House Bill No. 1280, Section 4, provides as follows:

"No person shall sell, offer for sale, expose for sale, transport, or deliver any graded fluid milk or graded fluid milk products in this state unless the milk or milk products are graded and produced, transported, processed, manufactured, distributed, labeled and sold under state milk inspection and the same has also been produced or pasteurized as required by a regulation authorized by section 6 of this act and under proper permits issued thereunder. Only pasteurized graded fluid milk and fluid milk products as defined in section 2(4) shall be sold to the final consumer, or to restaurants, soda fountains, grocery stores, or similar establishments; except an individual may purchase and have delivered to him for his own use raw milk or cream from a farm."

It is obvious that this section prohibits the sale of milk in this state unless it has been produced in accordance with regulations issued pursuant to this statute and under proper permits as

Honorable R. Wendell Bailey

issued thereunder, with the limited exception allowing an individual to purchase raw milk or cream directly from the farm premises where it originated and have it delivered to him for his own use.

CONCLUSION

It is the opinion of this office that Section 4 of House Bill No. 1280 prohibits a dairy farmer from selling raw milk to the general public from a distribution center set up by the dairy farmer and located away from his farm premises.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard L. Wieler.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH  
Attorney General

NURSING HOMES:  
MISSOURI HOUSING  
DEVELOPMENT COMMISSION:

The Missouri Housing Development Commission, Sections 215.010, RSMo et seq., has the authority to make first mortgage loans for the construction of nonprofit facilities which will provide nursing home residential services for persons of low and moderate income who live on a permanent basis in such homes.

OPINION NO. 114

April 4, 1973

Mr. Peter W. Salsich, Jr.  
Chairman, Missouri Housing  
Development Commission  
3642 Lindell Boulevard  
St. Louis, Missouri 63108



Dear Mr. Salsich:

This opinion is in answer to your question asking:

"Under Chapter 215 R.S.Mo 1969, as amended, may the Missouri Housing Development Commission make a policy determination as to whether or not it may make first mortgage loans for the construction and rehabilitation of residential housing for occupancy by elderly persons of low and moderate income that will include in-house medical care, food accommodations and social service features and will be licensed by the Division of Health under Section 198.021, R.S.Mo where there is a need for such housing and where the Commission shall determine that construction and permanent loans are not otherwise available, wholly or in part, from private lenders upon reasonably equivalent terms and conditions?"

You also state that the organization involved is not for profit.

The question, as you indicate, centers on the definition of "residential housing" which is defined in Section 215.010(8) as follows:

"'Residential housing' means a specific work or improvement within this state undertaken

Mr. Peter W. Salsich

primarily to provide dwelling accommodations, including the acquisition, construction or rehabilitation of land, buildings and improvements thereto, and such social, recreational, commercial, communal or other nonhousing facilities as may be incidental or appurtenant thereto."

Under the provisions of Section 215.030, RSMo, the "Missouri Housing Development Commission", which is created under Section 215.020, RSMo, "has and may exercise all powers necessary or appropriate to carry out and effectuate its purpose, including but not limited to the following:

"(1) Make first mortgage loans, including mortgages insured or otherwise guaranteed by the federal government, to finance the building or rehabilitation of residential housing designed and planned to be available at low and moderate rentals or to be sold to low and moderate-income families and others upon such terms as hereinafter designated;

"(2) Insure any first mortgage loan, the funds of which are to be used to develop low and moderate-income residential housing and the borrower of which agrees to the restrictions placed on such projects by the commission;

"(3) To make or participate in the making of federally insured construction loans to sponsors of residential housing for occupancy by persons and families of low and moderate income. Such loans shall be made only upon determination by the commission that construction loans are not otherwise available, wholly or in part, from private lenders upon reasonably equivalent terms and conditions;  
. . ."

The purpose for the enactment of Sections 215.010, et seq., is set forth in the preamble to House Bill No. 130, 75th General Assembly, as introduced, which states the legislative declaration:

"Section 1. It is hereby found and declared that as a result of public actions involving highways, public facilities and urban renewal projects and as a result of the spread of



Mr. Peter W. Salsich

slum conditions and blight to formerly sound neighborhoods, there exists within Missouri a serious shortage of decent, safe, and sanitary housing available at low rentals to persons and families of low income. This shortage is inimical to the safety, health, morals and welfare of the residents of this State and the sound growth of its communities.

"Private enterprise and investment, have not been able to produce without assistance, the needed construction of decent, safe and sanitary housing at rentals which persons and families of low income can afford, or to achieve the urgently needed rehabilitation of much of the present low and moderate income housing stock. It is, therefore, imperative that the cost of mortgage financing, a major factor materially affecting rental levels in housing built by private enterprise, be made lower in order to reduce rental levels for low income persons and families; that the supply of housing for persons and families displaced by public action or natural disaster be increased; and that private enterprise be encouraged to sponsor, build and rehabilitate housing which will help prevent the recurrence of slum conditions and assist in their permanent elimination throughout Missouri."

It can easily be seen from this declaration of legislative purpose which included within its scope "persons" as well as "families" and from the substantive provisions of this law that the primary purpose of the law is a public one involving the general welfare. It was largely on this basis that we held that the Bill's provisions are not in violation of the Missouri Constitution in our Opinion No. 140, 1971, which was addressed to you.

Clearly the definition of "residential housing", above, is broad and not limited to family units. The word "dwell" means simply "to inhabit". Ballentines Law Dictionary, Second Edition, p. 417. It would seem then that the words "dwelling accommodations" as used in the definition mean accommodations for living.

Nursing homes which are licensed under Chapter 198 are within the definition of Section 198.011, RSMo, which provides in part:



Mr. Peter W. Salsich

"(1) The term 'nursing', 'convalescent' or 'boarding' home means a private home, institution, building, residence or other place, whether operated for profit or not, which provides, through its ownership or management, maintenance, personal care or nursing for three or more individuals not related to the operator, who by reason of illness, physical infirmities or advanced age are unable to care for themselves; or provides sheltered care to three or more individuals not related to the operator, which includes treatment or services which meet some need of the individual beyond the basic requirements for food, shelter and laundry. The term shall not include the following: . . ."

The general rule of construction respecting remedial public welfare statutes is that statutes enacted in the interest of the public welfare should be liberally construed. State ex rel. Laundry, Inc. v. Public Service Commission, 34 S.W.2d 37 (Mo. 1931). A remedial statute should be construed so as to meet the cases which are clearly within the spirit or reason of the law or within the evil which it was designed to remedy, provided such interpretation is not inconsistent with the language used, and all reasonable doubts should be resolved in favor of its applicability to the particular case. State ex rel. Brown v. Board of Education of City of St. Louis, 242 S.W. 85 (Mo. banc 1922).

In the premises we take note of the numerous problems attendant the furnishing of licensed nursing home residential care to low income persons and we recognize that the lack of such residential facilities poses a serious public welfare problem. We see no reason why the fact that such residents need more than food or shelter should disqualify such facilities from the aid of the Commission in the issuance of loans pursuant to the "state housing" laws. We thus conclude that such homes which accept persons on a permanent residential basis provide residential housing and may qualify for first mortgage loans.

#### CONCLUSION

It is the opinion of this office that the Missouri Housing Development Commission, Sections 215.010, RSMo et seq., has the authority to make first mortgage loans for the construction of nonprofit facilities which will provide nursing home residential services for persons of low and moderate income who live on a permanent basis in such homes.

Mr. Peter W. Salsich

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a long horizontal stroke at the end.

JOHN C. DANFORTH  
Attorney General

STATE EMPLOYEES RETIREMENT SYSTEM:  
MAGISTRATE CLERKS:  
MAGISTRATES:  
RETIREMENT:  
PENSION:

1. Magistrate court clerks who are paid in whole or in part out of state appropriations are entitled to membership and prior membership credit in the Missouri State Employees Retirement System.

2. Such magistrate court clerks are entitled to membership in the Missouri State Employees Retirement System on the full amount of their salaries.

OPINION NO. 115

September 12, 1973

Honorable William J. Cason  
State Senator, District 31  
215 East Franklin  
Clinton, Missouri 64735



Dear Senator Cason:

This is to acknowledge receipt of your request for a formal opinion of this office which reads as follows:

- "1. As a result of a recent case, Hawkins v. Mo. State Employees Retirement System, decided by the Kansas City Court of Appeals on October 26, 1972, are magistrate clerks now members of the Missouri State Employees Retirement System?
- "2. If so, are they entitled to prior service credit, and to what extent?
- "3. Must any contributions be made to the system by these clerks?
- "4. Can credit for past service be transferred from this retirement system to another?
- "5. If they are members, are they entitled to credit for the full amount of salary paid to them from whatever source?"

This opinion is applicable only to magistrate clerks who are paid in whole or in part out of state appropriations and who are presently employed as magistrate clerks and who did not retire before January 8, 1973.

Honorable William J. Cason

We will consider your first two questions in regard to whether or not magistrate clerks are eligible for membership and prior membership credit as a result of the case of Hawkins v. Missouri State Employees' Retirement System, 487 S.W.2d 580 (Mo.Ct.App. at K.C. 1973) which became final on January 8, 1973. The Hawkins case dealt with the questions as to whether or not a court reporter was entitled to membership and prior membership credit in the Retirement System. In this regard, Section 485.060, RSMo 1969, provides that a court reporter shall receive an annual salary of twelve thousand dollars (\$12,000) and Section 485.065, RSMo 1969, provides that that salary, sixty-five hundred dollars (\$6,500) is to be paid out of the state treasury. In reaching its decision, the court determined whether or not an individual court reporter came within the definitions of "employee" and "department" as those terms are defined in subsections (15) and (11) of Section 104.310, RSMo 1969.

"(11) 'Department', any department, institution, board, commission, officer, court or any agency of the state government receiving state appropriations including allocated funds from the federal government and having power to certify payrolls authorizing payments of salary or wages against appropriations made by the federal government or the state legislature from any state fund, or against trusts or allocated funds held by the state treasurer;

\* \* \*

"(15) 'Employee', any elective or appointive officer or employee of the state who is employed by a department and earns a salary or wage in a position normally requiring the actual performance by him of duties during not less than one thousand five hundred hours per year, including each member of the general assembly, but not including any employee who is covered under some other retirement or benefit fund to which the state is a contributor; except this definition shall not exclude any employee as defined herein who is covered only under the Federal Old Age and Survivors' Insurance Act, as amended. As used in sections 104.310 to 104.550, the term 'employee' shall include civilian employees of the Army National Guard or Air National Guard of this state who are employed pursuant to section 709 of title 32 of the United States Code and paid from federal appropriated funds;"

Honorable William J. Cason

The Kansas City Court of Appeals concluded that a court reporter was entitled to membership and prior membership credit in the Missouri State Employees Retirement System. The reasoning of the court was that a court reporter was an "employee" of the state as defined in subsection (15) of Section 104.310, RSMo 1969, and was employed by a "department" which receives state appropriations as defined in subsection (11) of Section 104.310, RSMo 1969.

In regard to the salaries of magistrate clerks, Section 483.485, RSMo 1969, provides in part as follows:

"In all counties each magistrate shall by an order duly made and entered of record appoint and fix the salary of a clerk of his court and may appoint such deputies and employees as may be necessary for the proper dispatch of the business of his court and fix their salaries at such sum as in his discretion may seem proper. The total salaries of clerk, deputies and other employees paid by the state shall in no event exceed the annual amount fixed in section 483.490 for clerk and deputy clerk hire of such courts; . . ."

Subsection 1 of Section 483.490, V.A.M.S., provides that the salaries of clerks provided for in Section 483.485 shall be paid by the state within certain limits according to population and assessed valuation of the counties upon requisition filed by judges of the various magistrate courts. Section 483.495, V.A.M.S., also provides that in each county of the state having more than one hundred twenty-five thousand and less than two hundred thousand inhabitants, the magistrates shall organize as a court with divisions. There shall be a chief clerk of the magistrate court who shall be elected by the qualified electors of the county and shall perform all duties and have all powers imposed by law upon clerks of magistrate courts generally.

It shall also be noted that the following appropriations for court reporters is found in Laws of Missouri 1969 at page 21:

"Section 4.235. To the Comptroller  
For personal service and expenses  
of court reporters of circuit  
courts and courts of criminal  
corrections  
Personal Service and Expenses  
From General Revenue. . . . . \$375,000"

Honorable William J. Cason

Similarly, the following appropriation for magistrate clerks is found in Laws of Missouri 1969 at page 21:

"Section 4.240. To the Comptroller  
For the compensation and ex-  
penses of magistrates and  
compensation of magistrate  
clerks  
From General Revenue. . . . . \$2,486,500"

As a result of the foregoing statutory provisions, it is our view that the situation of magistrate clerks is essentially the same as that of court reporters. The reasoning of the Kansas City Court of Appeals in the Hawkins case then applies and a magistrate clerk is considered to be an "employee" of the state as defined in subsection (15) of Section 104.310, RSMo 1969, and is employed by a "department" which receives state appropriations as defined in subsection (11) of Section 104.310, RSMo 1969. We therefore conclude that a magistrate clerk is entitled to membership and prior membership credit in the Missouri State Employees Retirement System.

We next consider your fifth question which reads as follows:

"5. If they are members are they entitled to credit for the full amount of salary paid to them from whatever source?"

The above issue was also considered by the Kansas City Court of Appeals in the Hawkins case involving court reporters. In this regard, the definition of "compensation" in subsection (9) of Section 104.310, RSMo 1969, reads as follows:

"(9) 'Compensation', all salary and wages payable out of any state, federal, trust, or other funds to an employee for personal services performed for the state;"

In construing the above-statutory definition, the court of appeals determined that the matter of services for the state was the important factor and that the source from which the employee was paid should not be deemed controlling. Therefore, it was the opinion of the court of appeals that the definition was clear and unambiguous so as to require all of the court reporters' compensation to be considered for the purpose of computing retirement, even though part of their salary was paid out of state funds and another part was paid out of county funds. It is submitted that similar reasoning is applicable to magistrate clerks. Consequently, we conclude that magistrate clerks are entitled to membership in the Missouri State Employees Retirement System on the full amount of their statutory salary, whether paid out of state or county funds.



Honorable William J. Cason

We next consider your third question in regard to whether or not any contributions are required to be made to the Retirement System by magistrate clerks. We must decline to render an opinion on this issue at this time, for the reason that we consider this to be a policy question to be decided by the board of trustees of the Missouri State Employees Retirement System, and since this office is required by Section 104.520, RSMo 1969, to furnish legal services upon request to the Retirement System, we may be involved in litigation concerning this question.

Lastly, we consider your fourth question as to whether or not credit for past service can be transferred from the Missouri State Employees Retirement System to another retirement system? It is our view that the answer to this question would depend on the statutes governing the specific retirement system in question, and since we do not have sufficient information on this question, we can not rule on this issue at this time.

#### CONCLUSION

It is the opinion of this office that:

1. Magistrate court clerks who are paid in whole or in part out of state appropriations are entitled to membership and prior membership credit in the Missouri State Employees Retirement System.

2. Such magistrate court clerks are entitled to membership in the Missouri State Employees Retirement System on the full amount of their salaries.

The foregoing opinion, which I hereby approved, was prepared by my assistant, B. J. Jones.

Yours very truly,



JOHN C. DANFORTH  
Attorney General



LIBRARIES:  
COUNTY LIBRARIES:

When the tax rate of the county  
library districts which join to  
form a consolidated district is

less than twenty cents per hundred dollars assessed valuation,  
that the tax rate of the consolidated district cannot be increased  
above the rate previously levied by the constituent districts with-  
out an election in accordance with procedures set out in Section  
182.650, V.A.M.S.

OPINION NO. 118

April 11, 1973

Mr. Charles O'Halloran  
State Librarian  
Missouri State Library  
308 East High Street  
Jefferson City, Missouri 65101



Dear Mr. O'Halloran:

This is in response to your request for an opinion on the fol-  
lowing question:

"... may two county library districts pres-  
ently levying a one mill tax, consolidate un-  
der H.B. 1114 [76th General Assembly, Section  
182.610, V.A.M.S.], using the process of reso-  
lution as provided in Section 182.620 and allow  
their rate of taxation to remain at 10¢ or one  
mill, or must the tax be increased to 20¢ or  
two mills? Can this increase in the rate of  
taxation be accomplished by resolution without  
submission of the tax increase to the voters  
of the districts? If, for local reasons, the  
boards of the involved counties wish to retain  
the 10¢ tax rate and are unwilling to increase  
the tax, do they have that option?"

Section 182.610, V.A.M.S., provides in part:

"Two or more county library district having  
the same rate of taxation on assessed valua-  
tion of taxable property within each district  
may join in creating a consolidated public  
library district, which shall have the same  
rate of taxation as districts forming the con-  
solidated public library district, . . ."  
[Emphasis added]

Mr. Charles O'Halloran

Section 182.650.1, V.A.M.S., provides in part:

"Whenever a consolidated public library district has been created it may levy a tax at a rate of not less than twenty cents . . . except that, any increase in the rate of taxation to be assessed shall, on resolution adopted by the board of trustees of the consolidated public library district, be submitted . . . to the qualified electorate of the respective counties for approval." [Emphasis added]

Section 182.610, V.A.M.S., clearly requires that the two or more county districts which join in forming a consolidated district have the same rate of taxation prior to the consolidation. That section also clearly indicates that the consolidated district is to have the same tax rate which previously existed in the constituent districts. That tax rate could be not less than one mill nor more than two mills, Section 182.010, RSMo Supp. 1971.

While it might appear that the use of the words "not less than twenty cents on the one hundred dollars of assessed valuation" (the equivalent of a rate of two mills), would require a consolidated district to levy a tax of twenty cents per hundred dollars, we are of the opinion that when the county districts prior to consolidation were levying a tax of a lesser rate, the existing tax is to continue until a tax rate of twenty cents per hundred or more is approved at an election.

Such a construction permits Sections 182.610 and 182.650 to be read in harmony. Section 182.610 provides that the existing tax rate continue; while Section 182.650 uses the permissive word "may" and provides that a tax increase is to be approved by the electorate. A construction which would permit a twenty cent tax rate when the existing rate was less than twenty cents would be contrary to Section 182.610 which provides that the rate for the consolidated district be the same as the constituent districts, and also contrary to the provision of Section 182.650 that any increase be submitted to the electorate.

#### CONCLUSION

It is the opinion of this office that when the tax rate of the county library districts which join to form a consolidated district is less than twenty cents per hundred dollars assessed valuation, that the tax rate of the consolidated district cannot be increased above the rate previously levied by the constituent districts without an election in accordance with procedures set out in Section 182.650, V.A.M.S.

Mr. Charles O'Halloran

The foregoing opinion, which I hereby approve, was prepared by my assistant, Charles A. Blackmar.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH  
ATTORNEY GENERAL

March 27, 1973

OPINION LETTER NO. 120

Honorable James I. Spainhower  
State Treasurer  
State Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. Spainhower:

This is in response to your request for an opinion as to the legality of the State Treasurer cashing payroll checks for state employees or using state funds to cash personal checks drawn by state employees.

It is our understanding that it has been customary for some years now for the Treasurer's Office to maintain a revolving cash fund for the purpose of cashing state payroll and personal checks for state employees.

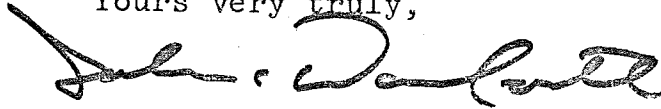
Section 30.230, RSMo 1969, dictates that the State Treasurer deposit all state moneys in the state treasury to the credit of the state on demand deposits in banking institutions selected by him and approved by the Governor and State Auditor and to withdraw such moneys thereafter as authorized by law. Section 30.170, RSMo 1969, provides that state moneys shall be disbursed only upon warrants drawn on the treasury according to law. Section 30.180, RSMo 1969, provides that all warrants presented to the State Treasurer shall be converted by the Treasurer into checks or drafts on a designated depository of state funds if the warrant is properly drawn against a legal appropriation, and does not exceed the amount thereof.

It seems clear from the language of these sections that all state moneys are to be deposited by the Treasurer upon receipt in banking institutions and disbursed therefrom only upon warrants drawn on the treasury according to law, with the exception that

Honorable James I. Spainhower

state moneys may be withdrawn for transfer to another bank account or for the purpose of investment by the Treasurer at any time without a warrant. This being so, the act of cashing a payroll check for a state employee or cashing a personal check drawn by a state employee with state moneys maintained in a revolving fund in the Treasurer's Office would constitute an illegal disbursement of state moneys.

Yours very truly,

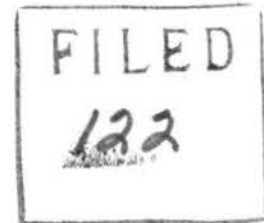
A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

March 14, 1973

OPINION LETTER NO. 122  
Answer by Letter - Card

Honorable Albert Spradling  
Missouri Senate, District 27  
Room 423 State Capitol Building  
Jefferson City, Missouri 65101



Dear Senator Spradling:

This letter is issued in response to your request for a ruling on the following question:

"If a charitable hospital organized under the Not-For-Profit Corporation Law of the State of Missouri owns a tract of real estate upon which its hospital is located and which has been declared tax exempt, as being used exclusively for charitable purposes, constructs a clinic building on a portion of its tax exempt property, which clinic building is leased to a group of private physicians who are members of the hospital staff, is that clinic building and the real estate upon which it is located taxable?"

You provide the following facts. Community Memorial Hospital, Moberly, Missouri, is a not-for-profit corporation. In Community Memorial Hospital v. City of Moberly, 422 S.W.2d 290 (Mo. 1967), the Missouri Supreme Court declared that its property is tax exempt pursuant to Section 137.100, RSMo, as being used exclusively for charitable purposes. Since then, the Board of Directors authorized the construction of a clinic building on the northwest portion of the hospital grounds for lease to four private physicians. The building has been occupied since August of 1972. The lease provides that the rent for each office

Honorable Albert Spradling

shall be \$150 per month for the first year. Thereafter, the rent shall be calculated by a formula to amortize construction costs and include the interest and insurance. At no time is there a charge for the use of the ground upon which the building is located and the adjacent parking lot.

In addition, you state that in exchange for the beneficial lease to the physicians, the hospital has received more business from having recruited four young physicians. Having their offices on the hospital grounds has provided more efficient and continuous emergency care room. Also, the physicians contribute without charge to the hospital and the training programs for the nurses.

We assume from your statement of facts and from the terms of the lease that the clinic-office building is used exclusively by the four physicians as their offices for private practice.

Constitutional exemption from taxation of certain property is granted by Article X, Section 6, of the Missouri Constitution:

"All property, real and personal, of the state, counties and other political subdivisions, and nonprofit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void." (Emphasis added)

Implementing the constitutional provisions for religious, educational and charitable institutions is Section 137.100, RSMo 1969, which provides:

"The following subjects are exempt from taxation for state, county or local purposes:

\* \* \*

"(5) All property, real and personal, actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable and not held for private or corporate profit, except that



Honorable Albert Spradling

the exemption herein granted does not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom is used wholly for religious, educational or charitable purposes." (Emphasis added)

There are certain well established rules which must guide any determination of whether certain property is exempt from taxation. Generally, all property is liable to taxation unless specifically exempted. Taxation is the rule, exemption is the exception; and claims for exemption are not favored in the law. Bethesda General Hospital v. State Tax Commission, 396 S.W.2d 631 (Mo. 1965); Midwest Bible and Missionary Institute v. Sestric, 260 S.W.2d 25 (Mo. 1953). Exemption statutes must be strictly construed against the taxpayer and the burden is on the party claiming the exemption to establish clearly his right thereto. In re First National Safe Deposit Co., 173 S.W.2d 403 (Mo. banc 1943); State ex rel. St. Louis Y.M.C.A. v. Gehner, 11 S.W.2d 30 (Mo. banc 1928). However such statutes also should be reasonably construed so as not to curtail the intended scope of the exemption. Frisco Employees' Hospital Association v. State Tax Commission, 381 S.W.2d 772 (Mo. 1964); St. Louis Gospel Center v. Prose, 280 S.W.2d 827 (Mo. 1955).

Each tax exemption case is peculiarly one which must be decided upon its own facts. Furthermore, "dominant use" or "principal use" cannot be substituted for the words "used exclusively". Community Memorial Hospital v. City of Moberly, supra.

The Supreme Court of Missouri, in a number of cases, has held that the property must be used exclusively for the purposes for which it is exempt from taxation; that where the occupation and use primarily commercial in character are carried on for revenue even though the revenue be used for such charitable purposes, the property is not exempt from taxation.

In Evangelical Lutheran Synod of Missouri, Ohio, and Other States v. Hoehn, 355 Mo. 257, 196 S.W.2d 134 (1946), the court denied tax exempt status to a publishing corporation organized as a subsidiary of the Lutheran Church since it did an extensive business in competition with commercial printing houses. In contrast, the court in Young Women's Christian Association v. Baumann, 344 Mo. 898, 130 S.W.2d 499 (banc 1939); Missouri Goodwill Industries v. Gruner, 357 Mo. 647, 210 S.W.2d 38 (1948), granted tax exemption since the use of the property was purely charitable. Recently, the court granted tax exemption in Bethesda General Hospital v. State Tax Commission, supra, holding

Honorable Albert Spradling

that the residence halls for full time employees on the grounds built by the hospital was necessary for the efficient operation of the hospital.

Although we have found no Missouri cases exactly on point, we note that the courts in Ohio and Vermont which have considered the issue have held that the building used by physicians as their offices are commercial in nature and thus not tax exempt. See Gifford Memorial Hospital v. Town of Randolph, 118 A.2d 480 (Vt. 1955); White Cross Hospital Association v. Warren, 215 N.E.2d 374 (Ohio 1966).

Upon a review of the particular facts of this case and guided by the principles as enunciated by the Missouri Supreme Court, it is the conclusion of this office that the clinic-office building and the land upon which it is built are not exempt from real estate taxes since the property is not used exclusively for charitable purposes. Although the hospital has obtained secondary benefits of having physicians close to the hospital and thereby having a more efficient emergency room care, the building is leased to four physicians for their office space who are engaged in the private practice of medicine for a profit. The use of this building has acquired a commercial character similar to that in Evangelical Lutheran Synod, *supra*; and White Cross Hospital Association v. Warren, *supra*. The physicians are clearly competing against other physicians who must lease their office space on which property taxes must be paid from private investors. Thus, the occupant physician will be able to net a higher profit due to the decreased rental costs of the office space.

Although the aims of the Community Memorial Hospital are laudable, it is clear that the property used by the physicians for private practice is not used exclusively for a purely charitable purpose.

Very truly yours,

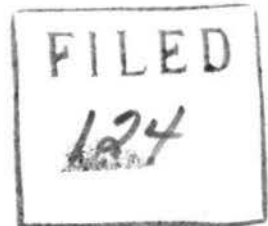
JOHN C. DANFORTH  
Attorney General

CITY ORDINANCES: Subsections 6 and 7 of Section 79.  
CITIES, TOWNS & VILLAGES: 450, RSMo Supp. 1971, do not grant  
an unlimited authority for a fourth  
class city to enact any ordinance it deems advisable if not in conflict with a state statute but does grant authority to enact ordinances and regulations governing matters of the same general kind and character as those expressly mentioned in Chapter 79, RSMo.

OPINION NO. 124

April 23, 1973

Honorable Al Nilges  
Representative, District 126  
Room 413, Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Nilges:

This is in response to your request for an opinion from this office as follows:

"Is the interpretation of Section 79.450, paragraphs 6 and 7 of the Revised Statutes of the State of Missouri 1971 Supplement that the matter of 4th Class City Ordinances is one of specific allowable areas or does this section allow any ordinances which do not directly conflict with the State Statute.

"The City of St. Clair has been hampered in its attempt to update ordinances by the interpretation of Section 79.450, paragraphs 6 and 7 of the Revised Statutes of the State of Missouri 1971 Supplement."

Section 79.450, RSMo, to which you refer, provides as follows:

"1. The board of aldermen shall enact ordinances to prohibit and suppress houses of prostitution and other disorderly houses and practices, including gambling and gambling houses, and all kinds of public indecencies, and may prohibit the selling or giving of intoxicating liquors to any minor or habitual drunkard.

"2. The board of aldermen shall also enact ordinances to restrain and prohibit riots,

Honorable Al Nilges

noises, assaults and batteries, disturbances of the peace, disturbances of religious and other lawful assemblies, indecent shows, exhibitions or concerts in any street, house or place in the city, disorderly assemblies, and to regulate, restrain and prevent the discharge of firearms, and the keeping and discharge of rockets, powder, fireworks or other dangerous combustible materials in the streets or in limits of the city.

"3. The board of aldermen may also regulate and control the construction of buildings, the construction and cleaning of fireplaces, chimneys, stoves and stovepipes, ovens, boilers, kettles, forges or any apparatus used in any building, manufactory or business which may be dangerous in causing or promoting fires, and may provide for the inspection of the same.

"4. The board of alderman may also provide by ordinance limits within which no building shall be constructed except of brick or stone or other incombustible materials, with fire-proof roofs, and impose a penalty for the violation of such ordinance, and may cause buildings commenced, put up or removed into such limits in violation of such ordinance, to be removed or abated.

"5. The board of aldermen may also purchase fire engines, hook and ladder outfits, hose and hose carts, buckets and all other apparatus useful in the extinguishing of fires, and organize fire companies and prescribe rules of duty for the government thereof, with such penalties for the violation thereof as they may deem proper, and not exceeding one hundred dollars and to make all necessary expenditures for the purchase of such fire apparatus and the payment of such fire companies.

"6. The board of aldermen may enact or make all ordinances, rules and regulations necessary to carry out the purposes of this chapter.

"7. The board of aldermen may enact or make all ordinances, rules and regulations,

Honorable Al Nilges

not inconsistent with the laws of the state, expedient for maintaining the peace, good government and welfare of the city and its trade and commerce."

You inquire whether paragraph 6 and 7 of the above statute, in regard to the authority of the board of aldermen of a fourth class city to enact city ordinances, is one of specific allowable areas or does it allow any ordinances which do not directly conflict with the state statute.

No specific subject matter for the board of aldermen to consider in the enactment of an ordinance is submitted so our discussion of the powers and authority of such city to enact ordinances has to be upon general principles of law.

Cities have and can exercise only such powers as are conferred by express or implied provisions of law, their charters or statutory grants being a grant and not a limitation of power, subject to strict construction with doubtful powers resolved against the city. City of Springfield v. Clouse, 206 S.W.2d 539 (Mo. banc 1947); Taylor v. Dimmitt, 78 S.W.2d 841 (Mo. 1934).

Since a fourth class municipality has only such powers and authority as is expressly granted by the legislature, the question arises as to the interpretation of subsections 6 and 7 of the above statute. Are they to be considered as a general grant of power and authority to the city following a specific grant of power to grant ordinances governing specific subject matter. The question arises under the above statute whether the legislature intended to grant authority to the city to enact ordinances governing any subject matter that might be deemed advisable unless such ordinance would be in direct conflict with a state statute.

The general rule of statutory construction where powers of a municipal corporation are defined in words of particular and specific meaning followed by general words is stated in 62 C.J.S. Municipal Corporations §121:

"If a charter, statute, or constitutional provision, in defining the powers of a municipal corporation, enumerates certain things which it may do by words of particular and specific meaning, and such enumeration is followed by general words, the general words are not to be taken in their widest sense, but are restricted to things of the same general kind as those enumerated, unless the contrary intent appears.



Honorable Al Nilges

The rule of ejusdem generis is only a rule of construction to be used as an aid in ascertaining the intent of the enacting body, however, and it does not apply where the legislative intent is clear from the statute or charter provision itself, the cardinal rule, in determining whether the rule of ejusdem generis should be applied to a catch-all provision in a city charter following specific provisions, being to ascertain the intent of the charter provision."

In McQuillin, Municipal Corporations, Revised Edition 1966, paragraph 10.24 it provides as follows:

"It has been said in some cases that municipal powers granted by a 'general welfare' clause in a charter or statute do not extend or enlarge powers specifically granted, and that such a clause merely permits the municipal authorities to exercise discretion within the scope of powers specifically granted; and it has been said that, as a municipal corporation possesses no powers not derived from its charter, such general terms, as 'full powers of self-government,' and 'all powers of municipal government not prohibited by this charter,' add nothing to the terms of the charter; the charter must still be the measure of authority to sustain an act done by the corporation. However, the trend of the decisions in some states is towards a relaxation of the rule of strict construction of the general welfare clause in a charter. Surely such clause following an enumeration of specific powers, does not confer other powers that do not fall strictly within the customary and usual orbit of municipal activity, and which are not required to be exercised to accomplish the purpose of municipal government.

"The general rule seems to be that where particular powers expressly conferred are followed by a general grant of power, such general grant by intendment may include all powers that are fairly within the term of the grant, and which are essential to the purposes of the municipal corporation, and consistent with the

Honorable Al Nilges

particular powers. And it has been held that 'the general powers usually given to municipal corporations are designed to confer other powers than those specifically enumerated' and that 'general powers conferred are to be construed with reference to the purposes of the incorporation.' Otherwise stated, where the exercise of particular powers may be fairly included in and authorized by general powers granted, the rule *expressio unius est exclusio alterius* is not applied to exclude powers that serve the purposes for which municipalities are organized where such powers are consistent with other powers conferred and with limitations imposed by the charter or by statute upon the municipal powers.

"It has been held that where general words follow particular and specific words in a statute granting powers to municipalities the general words must be construed to include only things of the same kind, class or nature as those indicated by the particular and specific words, unless there is something in the statute, or its context, which shows that the doctrine of *eiusdem generis* should not be applied. But where a municipal corporation has been given a certain power by specific provision of a statute, such power cannot be added to by general language found in the same act."

In Lovins v. City of St. Louis, 84 S.W.2d 127 (Mo. banc 1935), the question before the court involved the powers, duties, and authority of the city of St. Louis as compared with that of St. Louis County under the constitutional provision authorizing the city of St. Louis to perform, among other things, "all other functions" in relation to the state in the same manner as if it were a county. The question before the court was whether the phrase "all other functions" should be interpreted as comprising only functions of the same general nature as those specified in connection with the phrase and others of the same nature. In discussing this the court stated, l.c. 130:

"The predominant character and phase of St. Louis as a city in every corporate sense, to which reference was made in a preceding paragraph, is established and embraced only in the scheme set out in sections 20, 21, and



Honorable Al Nilges

22 of said constitutional amendment (R. S. 1929, pp. 130-131). Neither grant nor limitation of appeal appears therein. The sole and only section found in the amendment which confers upon St. Louis any rights, powers, or functions as a quasi county or political subdivision of the state is section 23 (R. S. 1929, p. 131), of which the relevant part reads: 'The city, as enlarged, shall be entitled to the same representation in the General Assembly, collect the state revenue and perform all other functions in relation to the State, in the same manner, as if it were a county as in this Constitution defined.' Under the maxim ejusdem generis 'all other functions' must be interpreted as comprising functions of the same general nature as those specific in connection with that phrase, and the intended functioning means normal action in relation to the manner specific and others of the same nature. A county, as a governmental unit composed of the people resident within its prescribed territory, can only function concerning affairs committed to it as a governmental unit. It has nothing to do with the purely corporate or nongovernmental affairs of the city as such and no functions concerning them to perform. The city of St. Louis, in so far as its county functions extend, is coequal in that respect with all other counties in the state but not different therefrom. Constitutionally, while St. Louis in its entirety is of a dual nature, it is in no sense either a super-city proper or a super-county. It is the declared purpose of said section 23 that the charter of the city shall always be in harmony with the Constitution and subject to the laws of the state."

Applying these principles of law, it is our opinion that subsections 6 and 7 of the above statute do not constitute a general grant of power and authority of a fourth class city to enact any and all ordinances it may deem necessary so long as it is not in conflict with a state law, but is a grant of authority for the board of aldermen to enact ordinances and regulations in regard to things of the same general kind concerning matters expressly mentioned in Chapter 79, RSMo, and those necessarily implied in order to enforce those ordinances on matters specifically enumerated.

Honorable Al Nilges

CONCLUSION

It is the opinion of this office that subsections 6 and 7 of Section 79.450, RSMo Supp. 1971, do not grant an unlimited authority for a fourth class city to enact any ordinance it deems advisable if not in conflict with a state statute but does grant authority to enact ordinances and regulations governing matters of the same general kind and character as those expressly mentioned in Chapter 79, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

March 20, 1973

OPINION LETTER NO. 125  
Answer by Letter - Klaffenbach

Honorable Robert Fowler  
State Representative, District 69  
Room 401 Capitol Building  
Jefferson City, Missouri 65101

FILED

125

Dear Representative Fowler:

This letter is in answer to your questions asking:

"A Park Board is duly established under the provisions of V.A.M.S. 90.520. The stated purpose for the passage of a bond issue by the City Council is that the proceeds will be used for City Parks.

"Q-1. Are the proceeds of the bond issue 'money received for such parks' within the meaning of the fourth sentence of V.A.M.S. 90.550?

"Q-2. Where the park board furnishes 'properly authenticated vouchers on moneys received for such parks' is the duty of 'the proper officers of said city or town' to write the drafts or checks a ministerial one or a discretionary one?

"Q-3. Is the money received from the following sources, 'moneys received for such parks' within the meaning of the fourth sentence of V.A.M.S. 90.550?

A. Government Grants to the Park Boards or the City from the Federal or State governments for the acquisition or development of public parks.

Honorable Robert Fowler

B. Gifts and donations to the Park Board or the City for the benefit of City Parks.

"Q-4. Does the Park Board have the authority to buy land and charge the expenditure to the park fund, including bond and government grant money?"

Section 90.550, RSMo, provides:

"Said directors shall immediately after their appointment, meet and organize by the election of one of their number president, and by the election of such other officers as they may deem necessary. They shall make and adopt such bylaws, rules and regulations for their guidance and for the government of the parks as may be expedient, not inconsistent with sections 90.500 to 90.570. They shall have the exclusive control of the expenditures of all money collected to the credit of the park fund and of the supervision, improvement, care and custody of said park. All moneys received for such parks shall be deposited in the treasury of said city or town to the credit of the park fund and shall be kept separate and apart from the other moneys of such city or town and drawn upon by the proper officers of said city or town upon the properly authenticated vouchers of the park board. Said board shall have power to purchase or otherwise secure ground to be used for such parks, shall have power to appoint a suitable person to take care of said parks and necessary assistants for said person and fix their compensation, and shall have power to remove such appointees; and shall in general carry out the spirit and intent of sections 90.500 to 90.570 in establishing and maintaining public parks." (Emphasis added)

Your question 1 with respect to the proceeds of bond issue money; question 3A with respect to government grants; and question 4 with respect to government grants and bond issue money present questions which cannot be answered in the abstract.

In answer to your question 2 concerning the issuance of vouchers under the provisions of Section 90.550, it is our view

Honorable Robert Fowler

that such officers must honor proper park board park fund vouchers having no patent irregularity. We assume that the vouchers submitted by the park board are for lawful purposes.

Your question 3B is answer by Section 90.570, RSMo, which provides:

"Any person desiring to make donations of money, personal property or real estate for the benefit of such park shall have a right to vest the title to the money or real estate so donated in the board of directors created under sections 90.500 to 90.570, to be held and controlled by such board when accepted according to the terms of the deed, gift, devise or bequest of such property; and as to such property, the said board shall be held and considered to be the special trustees."

However, whether or not such cash donations must be deposited in the city treasury to the credit of the park board fund may depend on the terms of the gift.

That part of your question 4 asking whether the park board has authority to buy land is answered by the above underscored portion of Section 90.550 which provides that the board has authority to buy land to be used for parks.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 198  
7/21/72, Lee

OFFICERS:  
ASSESSORS:  
COMPENSATION:  
COUNTY OFFICERS:

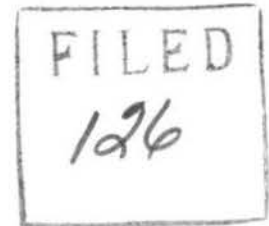
A county assessor appointed by the Governor to fill a vacancy in the office is required to take an oath of office as provided in Section 11, Article VII, Constitution of

Missouri, and qualifies for the office as provided under Chapter 53, RSMo, and that he is not entitled to the emoluments of the office until he qualifies.

OPINION NO. 126

April 5, 1973

Honorable John W. Reid, II  
Prosecuting Attorney  
Madison County  
148 East Main Street  
Fredericktown, Missouri 63645



Dear Mr. Reid:

This is in response to your request for an opinion from this office as follows:

"Which one of the following dates does the pay of the assessor appointed by the Governor to fill the unexpired term of the elected assessor (who died in office) begin:

1. The date stated in the Governor's Commission, February 5, 1973.
2. The date the Governor signed the Commission, February 21, 1973.
3. The date the appointed assessor took the oath of office, February 26, 1973.

"The elected assessor of Madison County, Missouri, Harold O. Shrum died on February 3, 1973. On February 21, 1973, the Governor of the State of Missouri appointed H. Latt Bennett assessor of Madison County, Missouri and stated his term of office began on February 5, 1973. On February 26, 1973, H. Latt Bennett took the oath of office of assessor of Madison County, Missouri."

In substance you inquire whether the pay of the assessor appointed by the Governor to fill the unexpired term of an elected

Honorable John W. Reid, II

assessor, who died in office, begins on the date the Governor signed the commission, the date stated in the Governor's commission as to the beginning of the term, or the date the appointed assessor took the oath of office.

Article VII, Section 11, Constitution of Missouri, provides as follows:

"Before taking office, all civil and military officers in this state shall take and subscribe an oath or affirmation to support the Constitution of the United States and of this state, and to demean themselves faithfully in office."

Chapter 53, RSMo, provides that there shall be elected a county assessor in each county of the state who shall hold office for a term of four years and until their successors are elected and qualified, unless sooner removed from office.

Section 53.030, RSMo, provides as follows:

"Every assessor shall take an oath or affirmation to support the Constitution of the United States and of this state, and to demean himself faithfully in office and to assess all of the real and tangible personal property in the county in which he assesses at what he believes to be the actual cash value. He shall endorse this oath on his certificate of election or appointment before entering upon the duties of his office."

The office of county assessor is created by statute and the person holding the office comes within the constitutional provision as well as the statute which implements the constitutional provision.

Our court has held this constitutional provision applies to deputy constables, *State v. Dierberger*, 2 S.W. 286 (Mo. 1886); judge of the probate court, *State ex rel. Gott v. Fidelity & Deposit Co. of Baltimore, Md.*, 298 S.W. 83 (Mo. 1927); mayor and board of aldermen of a city, *State ex rel. City of Clarence v. Drain*, 73 S.W.2d 804 (Mo. banc 1934).

In *state ex inf. McKittrick v. Langston*, 84 S.W.2d 131 (Mo. banc 1935), the court held that the local registrar of vital statistics was entitled to continue in office after his successor's appointment until successor qualified by taking the oath required by the Constitution. In discussing this question, the court stated, l.c. 132:



Honorable John W. Reid, II

". . . As John W. Williams was appointed to an office 'under the authority of this state,' it became a constitutional prerequisite to his entering upon the duties of his office that he comply with the requirements of section 6 of article 14 of the Constitution of Missouri which ordains that 'all officers, both civil and military, under the authority of this state, shall, before entering on the duties of their respective offices, take and subscribe an oath, or affirmation, to support the Constitution of the United States and of this State, and to demean themselves faithfully in office.' Since there is no showing that John W. Williams ever qualified as local registrar of vital statistics for the 318th registration district of Missouri, it is clear upon authority that the respondent as incumbent of the office was entitled to continue in office pending the qualification of his successor. Constitution of Missouri, art. 14, § 5; State ex rel. Robinson v. Thompson, 38 Mo. 192; State ex rel. v. Smith, 87 Mo. 158; State ex rel. v. Gray, 91 Mo. App. 438; State ex rel. v. Jenkins, 43 Mo. 261."

The legal right to the office carries with it the right to the salary, Davenport v. Teeters, 315 S.W.2d 641 (Spr.Ct.App. 1958). The right to the compensation begins when the officer qualifies, McQuillin - Municipal Corporation, 3rd Edition, Section 12.175 and State ex rel. Robinson v. Auditor, 38 Mo. 193 (1866).

Under the above authority, it is our opinion that the tenure of the county assessor appointed by the Governor to fill a vacancy does not begin until he takes the oath of office and qualifies by giving bond as provided in the Constitution and statute. It is our opinion he is not entitled to compensation until he qualifies for the office.

#### CONCLUSION

It is the opinion of this office that a county assessor appointed by the Governor to fill a vacancy in the office is required to take an oath of office as provided in Section 11, Article VII, Constitution of Missouri, and qualifies for the office as provided under Chapter 53, RSMo, and that he is not entitled to the emoluments of the office until he qualifies.

Honorable John W. Reid, II

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH  
Attorney General

STATE EMPLOYEES' RETIREMENT SYSTEM: During the interval until  
SUPERINTENDENT OF INSURANCE: January 1, 1975, the two  
RETIREMENT: elected members' terms on  
PENSIONS: the board of trustees of  
GOVERNOR: the Missouri State Employees'  
Retirement System shall be  
served by the Superintendent of Insurance and one appointment to  
be made by the Governor.

OPINION NO. 127

October 23, 1973



Mr. Charles Valier  
Member, Board of Trustees of the  
Missouri State Employees' Retirement System  
Executive Office, State Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. Valier:

This is to acknowledge receipt of your request for a formal opinion in regard to the following:

- "1. Whether or not the Board of Trustees of the Missouri State Employees Retirement System had the authority under the provisions of Section 104.450 of Senate Bill 548 which became effective on August 13, 1972, to appoint Mr. Proctor N. Carter and Mr. Herman Julien on December 1, 1972, to serve on the Board of Trustees, as the two elected members until January 1, 1975.
- "2. If the Board of Trustees did not have the authority to make these appointments, I would appreciate your opinion as to who has the authority to make these appointments."

It is our understanding that the individuals referred to were appointed members of the board of trustees under the former provisions of Section 104.450, RSMo 1969.

Under this statutory provision, Mr. Carter was appointed by the former governor on October 17, 1969, for a term ending August 29, 1975, and Mr. Julien was appointed by the former governor on July 13,

Mr. Charles Valier

1971, for a term ending August 29, 1977. Subsequently, Senate Bill No. 548, 76th General Assembly became effective on August 13, 1972.

Thereafter, we are advised that on November 14, 1972, the former governor informed the Secretary of State that he had appointed Mr. Julien and Mr. Carter as members of the board of trustees, for terms ending January 1, 1975, and until their successors were duly appointed and qualified, as provided in Senate Bill No. 548, 76th General Assembly.

The minutes of the board of trustees reveal that a motion was made on December 1, 1972, pursuant to the provisions of Section 104.450 of Senate Bill No. 548, 76th General Assembly, that Proctor N. Carter and Herman Julien be designated and appointed by the board as the two "elected members" to serve on the board of trustees on the effective date of the act until January 1, 1975. This motion was recorded and carried. Subsequently, on December 31, 1972, Mr. Carter and Mr. Julien retired from state employment and on January 3, 1973, the appointments of Mr. Carter and Mr. Julien were sent by the former governor to the Senate for confirmation and returned by the Senate on January 9, 1973.

Lastly, it is our understanding that Mr. Carter and Mr. Julien claim they are presently attending meetings of the board of trustees and serving in the alleged capacity of the "employee positions" on the board of trustees based on their alleged appointment by the board of trustees.

It is our belief that this opinion request may be answered by considering the second question in regard to who has the authority to make the appointments. In this connection, it is our view that the answer to this question depends on the meaning of the language:

"The two elected members' terms shall be served by members on the board at the effective date of this act."

The basic rule of statutory construction is to seek legislative intention, which should be ascertained from the words used, if that is possible, and, in so doing, the words should be given their plain and ordinary meaning, so as to promote the object and manifest purpose of the statute. State ex rel. State Highway Commission v. Wiggins, 454 S.W.2d 899 (Mo. banc 1970). Under such circumstances, a court must, if possible, give effect to the whole and every part of the statute, including every word, clause and sentence and to avoid unjust, absurd or unreasonable results. Stewart v. Johnson, 398 S.W.2d 850 (Mo. 1966) and State ex rel. Stern Brothers & Co. v. Stilley, 337 S.W.2d 934 (Mo. 1960).

Mr. Charles Valier

With the foregoing principles in mind, it should be noted that prior to August 13, 1972, the effective date of Senate Bill No. 548, 76th General Assembly, the board of trustees consisted of seven members, four of them ex officio, the State Treasurer, the State Comptroller, the Director of the Personnel Division, and the Superintendent of Insurance, and three members appointed by the Governor. As of August 13, 1972, Senate Bill No. 548 provided for three ex officio members, the State Treasurer, the State Comptroller, the Director of the Personnel Division, a member of the Senate appointed by the President Pro-Tem of the Senate, a member of the House of Representatives appointed by the Speaker of the House, two members of the system appointed by the Governor for four-year terms during the Governor's term of office, and two members elected by members of the system for four years to commence January 1, 1975.

As a result, it is our view that the phrase "members on the board at the effective date of this act" refers not to individuals but to offices. In this regard, the two offices provided for on the old board, but omitted on the new board, are the Superintendent of Insurance and one appointed by the Governor. Therefore, it is our opinion that during the interval until January 1, 1975, the two elected members' terms should be served by persons now or in the future holding offices whose occupants were members of the retirement board on the effective date of Senate Bill No. 548, that is, the Superintendent of Insurance and one person appointed by the Governor. This position is further supported by the language which was found in the old statute and which was repeated in Senate Bill No. 548:

" . . . Any vacancies occurring in the office of trustees shall be filled in the same manner as the office was filled previously."  
(Emphasis added)

Thus, it is logical to conclude that the legislature intended that during the interval until January 1, 1975, any vacancy in the employee offices on the board would be filled in the same manner as the office was filled previously which would necessarily include the hold-over offices of the Superintendent of Insurance and one appointment by the Governor. This interpretation is also consistent with a common custom in this country to make certain state officers ex officio members of state boards created for various purposes by statutory enactment. 63 Am.Jur.2d, Public Officers, Section 24, page 641. Lastly, it should be noted that any other interpretation is an unreasonable or absurd result. For example, if it be argued that the legislature intended that the two employee positions on the board are vacant until January 1, 1975, such interpretation is unreasonable for the reason that courts indulge in a strong presumption against a legislative intent to create a condition that might result in a vacancy in a public office. State ex

Mr. Charles Valier

inf. Lamkin ex rel. Harrison v. Tennyson, 151 S.W.2d 1090 (Mo. banc 1941). On the other hand, if it be argued that the legislature intended that the two employee offices on the board would be filled by former individuals on the board, such interpretation raises serious constitutional questions concerning the power of appointment, and we will not presume that the legislature intended such a result. See City of Kirkwood v. Allen, 399 S.W.2d 30 (Mo. banc 1966) and State ex inf. Hadley v. Washburn, 67 S.W. 592, 596 (Mo. banc 1902).

In view of the answer to the second question, it is obvious that the answer to the first question is "no" because the statute itself provides for the persons who are to serve ex officio and by appointment until 1975.

#### CONCLUSION

It is the opinion of this office that during the interval until January 1, 1975, the two elected members' terms on the board of trustees of the Missouri State Employees' Retirement System shall be served by the Superintendent of Insurance and one appointment to be made by the Governor.

Yours very truly,

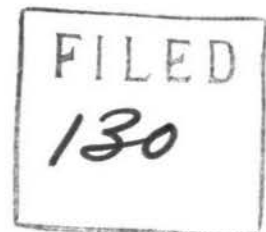


JOHN C. DANFORTH  
Attorney General

July 30, 1973

OPINION LETTER NO. 130  
Answer by letter-Klaffenbach

Honorable Wayne Goode  
Representative, District 68  
7335 Huntington Drive  
Normandy, Missouri 63121



Dear Representative Goode:

This letter is in response to your question asking whether the salary records of the employees of the University of Missouri are open to public inspection.

Section 172.180, RSMo, provides:

"Any citizen of the state shall, at all times, have access to and be permitted to take copies of any or all the records, books and papers of the board."

It is our understanding that the curators of the University of Missouri comply with the provisions of Section 172.180 and that all records, books, and papers of the board of curators of the University of Missouri are held in the office of the secretary of the board in University Hall, Columbia, Missouri, and are available for inspection and copying during normal business hours.

Yours very truly,

JOHN C. DANFORTH  
Attorney General





OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

April 9, 1973

JOHN C. DANFORTH  
ATTORNEY GENERAL

OPINION LETTER NO. 132

Honorable James I. Spainhower  
State Treasurer  
State Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. Spainhower:

This is in response to your request for an opinion as to whether or not the state can accept for security from banks holding state deposits student loans guaranteed by the United States Government.

Section 30.270, sub. 1, RSMo 1969, requires banks in Missouri holding state funds to pledge securities equal to at least 110% of the total amount of state funds on deposit. Among the types of securities which can be selected are ". . . bonds or other obligations guaranteed as to payment of principal and interest by the government of the United States or any agency or instrumentality thereof," Section 30.270, sub. 1(12), RSMo 1969.

This opinion deals with the legality of accepting student loans as security for the deposit of state funds. It will not deal with the wisdom of accepting these loans as security, which is a matter left by statute to the Governor, the State Auditor, and the State Treasurer.

The United States set up a guaranteed student loan program by the Higher Education Act of 1965 (P.L. 89-329). In response to this Act, Missouri enacted legislation to implement the student loan program in Missouri. Sections 173.095-173.190, RSMo 1969. Under the provisions of the state act, loans could be made to eligible students by banking institutions in this state with the guarantee by the Missouri Commission on Higher Education that the banking institution would be paid the amount of the loss on any guaranteed loan in the event of student default. Section 173.110, RSMo 1969. Under

Honorable James I. Spainhower

the provisions of P.L. 89-329, the federal government then agreed to reimburse the Missouri Commission on Higher Education for 80% of the principal paid on defaulted loans.

However, it is our information that the Missouri Commission on Higher Education is no longer guaranteeing repayment of student loans. As of March 1, 1973, student loans are now being guaranteed by the United States Commissioner of Education under the provision of P.L. 92-318, the educational amendment of 1972 to the Higher Education Act of 1965. Section 132B of this Act indicates that the liability of the United States Commissioner of Education on any default of a loan insured under this Act will be 100% of the unpaid balance of the principal amount of the loan plus interest.

It seems clear that the former student loans do not meet the requirements of Section 30.270, sub. 1(12). Assuming that they are bonds or other obligations, they are not guaranteed as to payment of principal and interest by the government of the United States, but guaranteed by the Missouri Commission on Higher Education with the provision for reimbursement by the federal government for an amount equal to 80% of the loss of principal. However, as of March 1, 1973, student loans under the Higher Education Act of 1965 as amended are guaranteed by an agency of the United States Government. Such a loan guaranteed as to the payment of principal and interest by the United States Commissioner of Education in the event of default would be proper security for the deposit of state funds.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

TORT DEFENSE FUND:  
DEPARTMENT OF CORRECTIONS:  
PHYSICIANS:

Interns and resident physicians  
of the University of Missouri  
Medical Center who provide medi-  
cal services on an irregular basis

without further compensation under the supervision and direction  
of the Medical Director of the Missouri Department of Corrections  
are "employees" or "agents" of the Missouri Department of Correc-  
tions as those terms are used in Section 105.710 (Senate Bill No.  
428, 76th General Assembly), and those interns and resident phy-  
sicians are included for coverage under the Missouri Tort Defense  
Fund.

OPINION NO. 133

May 3, 1973

Mr. George M. Camp, Director  
Missouri Department of Corrections  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Camp:

This opinion has been prepared in response to a recent  
request by your predecessor, William G. Miller. The question  
presented is as follows:

"Does the Tort Defense Fund, Section 105.  
710, include physicians, who perform volun-  
tary medical services, under the supervision  
of the Medical Director of the Department  
of Corrections, at the State Penitentiary?"

In explaining this question the opinion request further  
states:

"The State Penitentiary has an excellent  
medical facility. However, medical services  
to inmates are severely hampered by a lack  
of medical personnel. There is a group of  
interns and resident physicians at the Med-  
ical Center, University of Missouri, who  
are interested in performing services at the  
penitentiary hospital. These services would  
be without compensation on an irregular ba-  
sis. However, all services would be under  
the direction of the Medical Director of the  
Department of Corrections. The physicians

Mr. George M. Camp

desire to be advised whether their services would include them under the Tort Defense Fund."

Section 105.710 (Senate Bill No. 428, 76th General Assembly), provides:

"As part of the compensation to be paid to the director of the department of corrections, the director of the department of public health and welfare, the director of the division of health, the director of the division of welfare, the curators and regents of public institutions of higher education which award baccalaureate degrees, the director of the division of mental diseases and other officers, employees and agents of the department of corrections, the division of health, the division of welfare, and the division of mental diseases the comptroller is authorized to pay from the Tort Defense Fund, which is hereby created, all final judgments awarded in courts of competent jurisdiction to any claimant against the aforesaid officers, employees, and agents, for acts arising out of and performed in connection with their official duties in behalf of the state. Payment shall be limited to a maximum of one hundred thousand dollars for all claims, arising out of the same act except that no payment shall be made for any claim which arises because of or in connection with the operation of a motor vehicle either privately or publicly owned."

Under this statute, interns and resident physicians of the University of Missouri Medical Center who perform voluntary medical services under the supervision of the Medical Director of the Department of Corrections at the Missouri State Penitentiary would be eligible to receive the benefits granted in Section 105.710, RSMo, if they can be considered "employees" or "agents" of the Department of Corrections.

In Opinion No. 136, issued by this office on April 4, 1973, to Mr. Bert Shulimson, Director, Missouri Division of Welfare, this office concluded that "volunteers working with the Missouri Division of Welfare at regular hours, on specific assignments, under full time supervision of regular employees of the Division of Welfare would be . . . included for coverage under the Missouri

Mr. George M. Camp

Tort Defense fund." That conclusion was reached because those volunteers were found to be included within the class of "employees" of the Division of Welfare as that language is used in Section 105.710, RSMo. That opinion relied on the cases of Bollman v. Kark Rendering Plant, 418 S.W.2d 39 (Mo. 1967); Dean v. Young and Sears, Roebuck & Company, 396 S.W.2d 549 (Mo. 1965); Madsen v. Lawrence, 366 S.W.2d 413 (Mo. 1963); State ex rel. Maryland Casualty Co. v. Hughes, 164 S.W.2d 274 (Mo. 1942); and Trionon Hotel Co. v. Keitel, 169 S.W.2d 891 (Mo. 1943), to establish that the status of master and servant or employer and employee is defined by the presence of varied criteria, the most important of which is the right of the master or employer to control and direct the physical activities and conduct of the servant or employee in the performance of the services being rendered. Because the activities of the volunteers were supervised by regular employees of the Division of Welfare during the performance of the volunteers' services, the volunteers were considered "employees" of the Missouri Division of Welfare within the meaning of Section 105.710, RSMo.

This factor of control or right to control the conduct of interns and resident physicians is apparently present in the proposed relationship described in the opinion request. While the interns and the resident physicians will provide services without compensation on an irregular basis, the opinion request indicates that the services rendered would be under the direction and supervision of the Medical Director of the Department of Corrections. In Bollman v. Kark Rendering Plant, supra, the relationship in question was one existing between a father and son where the son assisted his father in the father's business on an irregular basis and without compensation. There the Missouri Supreme Court found that the relationship was one of employer and employee because the father had the right to control and did control his son's physical activities and conduct in the performance of his services. The court found this determinative of the employer-employee relationship even though the son worked for the father occasionally and actually received no wages for his work. Likewise, in the situation indicated in this opinion request, the fact that the services rendered by interns and resident physicians will be under the supervision and direction of the Medical Director of the Department of Corrections is sufficient to establish the employer-employee relationship even though the interns and resident physicians perform services on an irregular basis without other compensation.

The nature of medical services rendered by physicians and surgeons, however, would seem inherently to require an exercise of discretion and judgment on the part of the physician or surgeon

Mr. George M. Camp

rendering this service. Thus the question arises of whether interns and physicians rendering medical services under the direction and supervision of another physician are subject to sufficient control to acquire the status of servant or employee under the control or right to control test. This aspect of services rendered by the medical profession has been held not to preclude a physician or surgeon from occupying the status of an employee or agent. In Noren v. American School of Osteopathy, 223 Mo.App. 278, 2 S.W.2d 215 (St.L.Ct.App. 1928), a student of osteopathy was held to be the agent or servant of the school and the school's instructing osteopath. There the court stated ". . . where, as in the case here . . . the one physician retains control of the other . . . there is sufficient reason for holding that the relation of principal and agent does exist. . . ." (2 S.W.2d at 221). Likewise, physicians have been held to occupy the status of employee or agent in similar cases. Phillips v. St. Louis & S.F.R. Co., 211 Mo. 419, 111 S.W. 109 (1908); Smith v. Mallinckrodt Chemical Works, 212 Mo.App. 158, 251 S.W. 155 (St.L.Ct.App. 1923). Thus a physician or surgeon rendering medical services who is subject to the control and supervision of a superior, is not prevented from being the agent or employee of the superior by the nature of the services he renders.

Section 216.090, RSMo 1969 requires: "The director shall provide adequate medical treatment and adequate hospital facilities for all inmates in the institutions under his control." This duty to provide adequate medical treatment is satisfied by the services rendered by the Medical Director of the Department of Corrections. The opinion request states that this duty will be further performed by services rendered by interns and resident physicians of the University of Missouri Medical Center working under the supervision and direction of the Medical Director of the Missouri Department of Corrections. It is the opinion of this office that in this situation the interns and resident physicians of the University of Missouri Medical Center working under the direction and supervision of the Medical Director of the Department of Corrections to provide medical services to inmates are "employees" or "agents" within the meaning of Section 105.710, RSMo 1969, as amended 1972. Therefore, these interns and resident physicians enjoy the benefits given "employees" or "agents" of the Missouri Department of Corrections by that statute.

#### CONCLUSION

Therefore, it is the opinion of this office that interns and resident physicians of the University of Missouri Medical Center who provide medical services on an irregular basis without further compensation under the supervision and direction of

Mr. George M. Camp

the Medical Director of the Missouri Department of Corrections are "employees" or "agents" of the Missouri Department of Corrections as those terms are used in Section 105.710 (Senate Bill No. 428, 76th General Assembly), and that those interns and resident physicians are included for coverage under the Missouri Tort Defense Fund.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Stephen D. Hoyne.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a long horizontal stroke at the end.

JOHN C. DANFORTH  
Attorney General



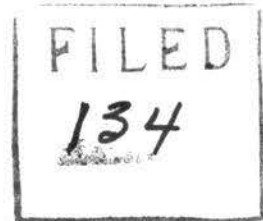
LICENSES:  
MENTAL HEALTH:

The Division of Mental Health has no authority to return license fees which accompany applications for the licensing of homes for the mentally retarded under H.C.S.H.B. No. 204, 76th General Assembly, Second Regular Session, even though a license is denied. However, in those cases where it is patently clear that the applicant is not required to have a license under such laws and no inspection is necessary, the applicant's fee should not be deposited in general revenue but should be returned to him.

OPINION NO. 134

May 7, 1973

Harold P. Robb, M.D.  
Director, Division of  
Mental Health  
722 Jefferson Street  
Jefferson City, Missouri 65101



Dear Dr. Robb:

This opinion is in response to your question asking whether the license application fees required under H.C.S.H.B. No. 204 of the 76th General Assembly, Second Regular Session, respecting licensing of homes for the mentally retarded, must be refunded to the applicant if the license is refused.

Section 2 of the Bill provides:

"The division shall establish a procedure for the licensing of all homes or institutions which accept mentally retarded persons for care, treatment or custody, except those state institutions operated by it. Applications for a license shall be made to the division upon forms provided by it and each application shall contain such information as the division requires, which may include affirmative evidence of ability to comply with the reasonable rules, regulations and standards adopted by the board. Each application for a license, except applications from a governmental unit, shall be accompanied by an annual license fee of seventy-five dollars for establishments which accept less than ten patients, and

Harold P. Robb, M.D.

one hundred fifty dollars from establishments which accept ten or more. All license fees shall be paid to the collector of revenue for deposit in the general revenue fund of the state treasury."

The above provisions appear to have been adopted from the language of Section 197.050, RSMo, relative to the licensing of hospitals. By contrast the provisions of subsection 3 of Section 198.031, RSMo, relative to the licensing of nursing homes by the Division of Health requires the payment of the license fee "upon approval" of the application.

There are two different types of fees. One type is a license tax for the privilege of being in a business where there is no regulatory function of the state or political subdivision over the exercising of that business. The other type of fee is that for engaging in a business which is subject to police power regulations. Thus, the key is whether or not the fee is used as money to cover the expense of administering the police power regulation or whether it was just a revenue producing fee. See 53 C.J.S., Licenses, Section 47, and 51 Am. Jur.2d, License and Permits, Section 40.

The statutes in question are of the police power regulatory type and the fee is for covering the expenses of the program. In Honorbilt Products v. City of Philadelphia, 112 A.2d 108, 110 (1955), the Supreme Court of Pennsylvania said that a license fee is applicable only to a type of business or occupation which is subject to supervision and regulation by a licensing authority under its police power, where such supervision and regulation are in fact conducted by the licensing authority, and the payment of the fee is a condition upon which the licensee is permitted to transact his business or pursue his occupation, and the purpose in exacting the charge is to reimburse the licensing authority for the expense of supervision and regulation.

Although the fee in question is denominated a "license fee" and not an inspection fee, it is obvious from the fiscal note to the Bill that the expenditure for personal services required under the Bill greatly exceeds the anticipated income from the licensing fees. It also seems fairly clear in this respect that the initial expenditure of the Division in determining whether or not a license shall issue is perhaps the largest single cost of annual licensing. From this we surmise that the "license fee" is a regulatory fee not conditioned upon whether or not a license ultimately issues.

Further, in this respect, we note that the license fee "shall be paid to the collector of revenue for deposit in the general

Harold P. Robb, M.D.

revenue fund of the state treasury." The officer receiving the fee has no authority to put the fee in a separate account or to hold the fee. His duty is to transmit the fee promptly to the state collector.

On the other hand, we wish to point out that some applications accompanied by license fees may patently indicate that an applicant is not subject to the licensing provisions and a license cannot issue. In such a case where a summary determination can be made that an applicant is not required to have a license under such laws and no inspection or processing is necessary, the applicant's fee should not be deposited in general revenue but should be returned to him.

#### CONCLUSION

It is the opinion of this office that the Division of Mental Health has no authority to return license fees which accompany applications for the licensing of homes for the mentally retarded under H.C.S.H.B. No. 204, 76th General Assembly, Second Regular Session, even though a license is denied. However, in those cases where it is patently clear that the applicant is not required to have a license under such laws and no inspection is necessary, the applicant's fee should not be deposited in general revenue but should be returned to him.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

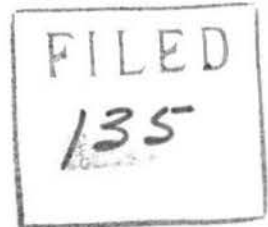
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

March 14, 1973

MASTER COPY

OPINION LETTER NO. 135

Mr. Charles Valier  
Office of the Governor  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Valier:

This is in response to your request for an opinion of this office concerning Reorganization Plans 1 and 2 of 1973. You have explained that the purpose of both plans is to transfer all duties of the directors of the Departments of Business and Administration and Public Health and Welfare to other officers, since those two officers are mainly figure-heads with few real duties, and thus such duties could be easily performed by other officers with substantial reduction of personnel and savings of appropriations.

Plan No. 1 provides that all duties provided in Sections 35.010 through 35.050, RSMo, for the director of the Department of Business and Administration are transferred and assigned to the Commissioner of Administration.

Plan No. 2 provides that certain duties provided in Chapter 191, RSMo, for the director of the Department of Public Health and Welfare are transferred to the various division heads of the department.

Both plans have been submitted to the legislature pursuant to Sections 26.500 and to 26.540, RSMo.

The first question you ask is whether these plans are within the authority of the reorganization law. Section 26.540, RSMo, provides:

"Reorganization plans shall relate only to abolishing or combining agencies in the executive branch of the state

government or to changing the organization thereof or the assignment of functions thereto. Each plan shall contain such provisions as are necessary to assure the uninterrupted conduct of the governmental services and functions affected by the proposed reorganization plan."

In Opinion No. 167, March 1, 1971, Patterson, we explained these provisions of law in relation to various reorganization plans and held that the law does not constitute an unconstitutional delegation of legislative power to the executive branch.

Therefore, we need only examine whether the plans meet the purposes of Section 26.540.

It is our opinion that the purpose of the plans is to transfer the "assignment of functions" from one officer to another, and therefore they are within the authority of the reorganization law. Furthermore, it appears obvious that each of the transfers are logical, in that the Commissioner of Administration is now directed by law to perform similar duties, Section 26.300, RSMo, and the various division heads of the divisions within the Department of Public Health and Welfare now also perform similar duties as the director of the department.

Your second questions is whether the plans accomplish the stated purpose. We have examined the plans and the statutory duties and it is our opinion that the plans do accomplish the stated purpose of the assignment of functions from one officer to another except for a possible problem of interpretation in paragraph 8 of Plan No. 2.

Your third question is whether paragraph 8 is valid in view of what you advise was a typographical error. Paragraph 8 now reads:

"8. All appeals provided for in Section 208.080, RSMo, 1969, shall be taken by the director of the Division of Welfare."  
(emphasis supplied).

You advise that the word "by" should be "to" so that appeals are taken to the Division of Welfare.

The error is obvious because Section 208.080 provides now for appeals "to" the director of the Department of Public Health and Welfare. The stated purpose of the plan is simply to reassign functions, so that what was intended was to

Page 3  
Mr. Charles Valier  
March 13, 1973  
Opinion Letter No. 135

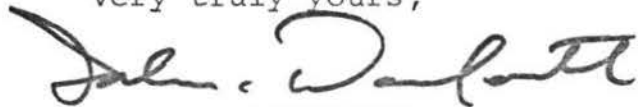
substitute the director of the Division of Welfare for the director of the Department. This would be within the authority of Section 26.540, where if the word "by" was intended, this would change the substantive meaning of Section 208.080. It would therefore, constitute more than a reassignment of functions and would not be authorized by Section 26.540.

In the rules of statutory construction the meaning of a statute may be plain though it contains mistakes in writing, grammar, spelling, punctuation, misnomers, misdescriptions, surplusage or omits words. State ex rel. Klein v. Hughes, 351 Mo. 651, 173 S.W.2d 1877. Furthermore, words omitted may be read into a statute to make the statute harmonize with reason and properly express the legislature's intent. State ex rel. and to use of Tadlock v. Mooneyham, 212 Mo.App. 573, 253 S.W. 1098.

Where the language leads to a manifest contradiction of the apparent purpose of the enactment, a construction may be adopted which will modify the meaning of the words. Glaser v. Rothschild, 221 Mo. 180, 120 S.W. 1. In State ex rel. Stinger v. Krueger, 280 Mo. 293, 217 S.W. 310, the Court read "and" into the statute in question in place of "or" to carry out the plain purpose of the statute and when to adopt the literal meaning would defeat the purpose or lead to an absurd result.

Accordingly, it is our opinion that paragraph 8 of Plan 2 should be read as "to" instead of "by".

Very truly yours,



JOHN C. DANFORTH  
Attorney General



May 4, 1973

OPINION LETTER NO. 137  
Answer by Letter - Klaffenbach

Mr. Harold L. Fridkin  
Jackson County Counselor  
415 East 12th Street  
Kansas City, Missouri 64106



Dear Mr. Fridkin:

This letter is in answer to your request for an opinion in which you ask:

"Is a building being constructed for educational or religious purposes exempt from taxation under Section 137.100(5) RSMo."

You have not furnished us with precise information respecting the facts giving rise to your request and we assume that you are not referring to buildings owned by the state or a political subdivision.

We believe that your question is answered by our Opinion No. 307, dated June 25, 1970, to Crow, copy enclosed, in which we held that a building in the course of construction intended to be used for charitable purposes but not so used at the time fixed for assessment of taxes is not exempt from taxation.

The question posed in that opinion also concerned religious purposes and therefore your question in that respect is directly answered by that opinion. While we did not consider educational purposes in that opinion, we are of the view that the reasoning is applicable and that such buildings in the course of construction and not used at the time for such purposes are subject to taxation.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Enclosure





OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

April 17, 1973

OPINION LETTER NO. 139

Herbert R. Domke, M.D., Director  
Missouri Division of Health  
Broadway State Office Building  
Jefferson City, Missouri 65101

Dear Dr. Domke:

You have requested my legal opinion on the following question relating to the Missouri Controlled Substance Act, Chapter 195, RSMo (L. Mo. 1971: House Bill No. 69, 76th General Assembly):

"Does the Division of Health have the authority to institute proceedings to revoke or suspend a controlled substance registration issued pursuant to Section 195.030 (2) R.S.Mo. for reasons other than those set forth in Section 195.040 (7) R.S.Mo?"

"Specifically, may the Division institute such proceedings based upon any of the factors listed in Section 195.040 (3) R.S.Mo?"

Section 195.030, RSMo, requires all manufacturers, suppliers, distributors, dispensers and prescribers of controlled substances to first obtain annually a registration from the Division of Health.

Section 195.040.3, RSMo Supp. 1971, states the criteria to be employed by the Division in granting registrations and reads as follows:

"3. The division of health shall register an applicant to manufacture, distribute or dispense controlled substances unless it determines that the issuance of that registration

Herbert R. Domke, M.D.

would be inconsistent with the public interest. In determining the public interest, the following factors shall be considered:

(1) maintenance of effective controls against diversion of controlled substances into other than legitimate medical, scientific, or industrial channels;

(2) compliance with applicable state and local law;

(3) any convictions of an applicant under any federal or state laws relating to any controlled substance;

(4) past experience in the manufacture or distribution of controlled substances and the existence in the applicant's establishment of effective controls against diversion;

(5) furnishing by the applicant of false or fraudulent material information in any application filed under sections 195.010 to 195.320;

(6) suspension or revocation of the applicant's federal registration to manufacture, distribute or dispense narcotics or controlled dangerous drugs as authorized by federal law; and

(7) any other factors relevant to and consistent with the public health and safety."

Section 195.040.7, RSMo Supp. 1971, states the grounds for which the Division may suspend or revoke a registration and reads as follows:

"7. A registration to manufacture, distribute, or dispense a controlled substance may be suspended or revoked by the division of health upon a finding that the registrant:

(1) has furnished false or fraudulent material information in any application filed under sections 195.010 to 195.320;

(2) has been convicted of a felony under any state or federal law relating to any controlled substance; or

Herbert R. Domke, M.D.

(3) has had his federal registration to manufacture, distribute or dispense suspended or revoked."

Subsection 11 of Section 195.040 confers the right to a hearing upon any applicant or registrant whose registration the Division proposes to deny, suspend, revoke or refuse to renew. Subsections 12 and 13 grant the right of appeal to any person who has been refused registration or has had a registration revoked or suspended by the Division of Health.

We note that all statutory provisions above referred to, except subsections 12 and 13 of Section 195.040, were adopted without significant change from the Uniform Controlled Substance Act as prepared and approved by the National Conference of Commissioners on Uniform State Laws in August, 1970. Subsections 12 and 13, relating to the right of appeal, do not appear in that form in the Uniform Act, but were carried over verbatim from Section 195.040 of the Missouri Narcotic Drug Act, Chapter 195, RSMo 1969. The Narcotic Drug Act was repealed by the Controlled Substance Act.

In our view, the Controlled Substance Act distinguishes between the application for registration and revocation or suspension of the annual registration. We believe that subsection 3 of Section 195.040 states the grounds for consideration of an application for registration, and that subsection 7 of that section states the grounds for revoking or suspending a registration. It appears to us that the legislature intended to allow the Division of Health considerable latitude in determining whether to issue a registration, either initially or annually thereafter, but that the Division should revoke or suspend a registration prior to its annual expiration only for certain limited causes. We are, therefore, of the opinion that the Division of Health does not have the authority to institute proceedings to revoke or suspend a controlled substance registration for reasons other than those contained in subsection 7 of Section 195.040, RSMo Supp. 1971, and that it may not revoke or suspend a registration upon the grounds set forth in subsection 3 of that section.

Since it appears to us that the controlled substance law creates only the right of annual registration, and not the right of indefinite registration, we believe the annual renewal of a registration can be treated on the same basis as an original application for registration. Accordingly, we feel that it would be proper for the Division of Health to consider those factors set forth in subsection 3 of Section 195.040 upon application for renewal of a controlled substance registration.

Yours very truly,



JOHN C. DANFORTH  
Attorney General



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

May 23, 1973

OPINION LETTER NO. 142

Honorable Earl L. Schlef  
Representative, District 60  
Room 302, Capitol Building  
Jefferson City, Missouri 65101

Dear Representative Schlef:

This letter is in response to your official request for an opinion from the office of the Attorney General in which you make inquiry regarding the constitutionality of Section 311.090, RSMo 1969, as follows:

"Request your opinion as to the constitutionality of the 20,000 population figure for an incorporated city to be eligible to issue liquor by the drink licenses since there is a contention that the 20,000 population figure is discrimination against those people living in towns smaller than 20,000 population."

Section 311.090, RSMo 1969, provides that:

"1. Any person who possesses the qualifications required by this chapter, and who meets the requirements of and complies with the provisions of this chapter, and the ordinances, rules and regulations of the incorporated city in which such licensee proposes to operate his business, may apply for and the supervisor of liquor control may issue a license to sell intoxicating liquor, as in this chapter defined, by the drink at retail for consumption on the premises described in the application; provided, that no license shall be issued for the sale

Honorable Earl L. Schlef

of intoxicating liquor, other than malt liquor containing alcohol not in excess of five percent by weight, by the drink at retail for consumption on the premises where sold, in any incorporated city having a population of less than twenty thousand inhabitants, until the sale of such intoxicating liquor, by the drink at retail for consumption on the premises where sold, shall have been authorized by a vote of the majority of the qualified voters of said city. Such authority to be determined by an election to be held in said cities having a population of less than twenty thousand inhabitants, under the provisions and methods set out in this chapter. The population of said cities to be determined by the last census of the United States completed before the holding of said election; provided further, that for the purpose of this law, the term 'city' shall be construed to mean any municipal corporation having a population of five hundred inhabitants or more; provided further, that no license shall be issued for the sale of intoxicating liquor, other than malt liquor containing alcohol not in excess of five percent by weight, by the drink at retail for consumption on the premises where sold, outside the limits of such incorporated cities.

"2. In each instance, a bond in the sum of two thousand dollars, with sufficient surety, to be approved by the supervisor of liquor control, must be given for the faithful performance of all duties imposed by law upon the licensee, and for the faithful performance of all the requirements of this law, and any violation of such conditions, duties or requirements shall be a breach of said bond and shall automatically cancel and forfeit the license granted hereunder; provided, that no person financially interested in the sale of intoxicating liquor at wholesale shall be accepted as surety on any such bond."

We have assumed from the terminology of your question that you desire our opinion as to whether the above-quoted statutory section deprives individuals living in incorporated cities of less than 20,000 population of the equal protection of the laws. We believe that the Supreme Court of the state of Missouri disposed of all

Honorable Earl L. Schlef

questions regarding the constitutionality of the section in question in the case of State v. Kennedy, 343 Mo. 786, 123 S.W.2d 118, 120-123 (Mo. 1938). The Kennedy case has not been reversed and represents the controlling legal authority regarding the constitutionality of what is now Section 311.090, RSMo 1969.

The state of Missouri, in common with all other states of the United States, has been given broad latitude by the Twenty-first Amendment to the Constitution of the United States to enact laws relating to the liquor business. In that state liquor statutes are protected under the Twenty-first Amendment, such statutes are not normally subservient to other federal constitutional provisions. We quote from California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342, 349-350 (1972):

"While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals. In Hostetter v. Idlewild Liquor Corp., 377 US 324, 330, 12 L Ed 2d 350, 84 S Ct 1293 (1964), the Court reaffirmed that by reason of the Twenty-first Amendment 'a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' Still earlier, the Court stated in State Board v. Young's Market Co., 299 US 59, 64, 81 L Ed 38, 57 S Ct 77 (1936):

'A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth.'"

It is our view that Section 311.090, RSMo 1969, is not, therefore, unconstitutional insofar as it requires an affirmative vote in incorporated cities of less than 20,000 in order that liquor by the drink may be sold therein, but makes no such requirement as regards incorporated cities of greater than 20,000 population.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

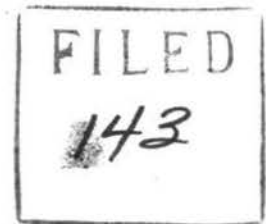
ELECTIONS:  
REGISTRATION:

County local option registration under Chapter 114, RSMo, may begin at any time after the law becomes operative following publication of the adoption of local option registration and must begin by the fifteenth day of September following such adoption. Such registration must be concluded as soon as possible. Voter registration is required for elections covered by Chapter 114 after voter registration is concluded.

OPINION NO. 143

May 2, 1973

Honorable Gary W. Fleming  
Prosecuting Attorney  
Pettis County, Courthouse  
Sedalia, Missouri 65301



Dear Mr. Fleming:

This opinion is in response to your question asking:

"(1.) May the Pettis County Clerk commence county wide voter registration immediately following approval of the same under Section 114.010(4) Mo. R. S. 1969 or must registration be postponed until September 15, the following year under Section 114.040(1) Mo. R. S. 1969 when the City of Sedalia already has voter registration, when there is no change in any boundaries in either city or county precincts, and when the County Clerk already has the necessary registration supplies?

"(2.) When must county wide registration as stated in above question be completed?

"(3.) In the event that voter registration may not commence prior to September 15, the year following approval of voter registration, must those voters who register prior to that time re-register?"

In our Opinion No. 48, dated January 30, 1968, to Ferry, we held that the provisions of Chapter 116, RSMo, respecting the registration of voters in cities should be implemented by the registration of voters as soon as possible after adoption.



Honorable Gary W. Fleming

In the premises, under the provisions of subsection 4 of Section 114.010, RSMo, if the majority of the votes cast are in favor of registration the county court is required to give notice thereof by publication and "such law shall become operative from the time such publication is made." The question arises, of course, from the provisions of Section 114.040, RSMo, which state in part:

"1. There shall be a registration of all qualified voters in all counties adopting this chapter beginning on the fifteenth day of September next following the date upon which this chapter is adopted, and the registration of voters shall be governed by the provisions of this chapter, except this chapter does not apply where: . . ."

Further, Section 114.070, RSMo, provides:

"At least five days prior to the initial registration under this chapter, the county clerk shall publish a notice of registration, giving the dates, hours and places of registration, in a newspaper of general circulation published in the county."

Section 114.040 standing alone does not appear to be ambiguous. However, when read in conjunction with the provisions of Section 114.010, which states that the law becomes operative from the time of publication after adoption, the provisions of Section 114.040, requiring registration beginning on the fifteenth day of September next following the date of adoption, an obvious ambiguity results. Both laws were passed at the same time (L. 1959, H.B. No. 127) and must be read together.

We find no case holding or statutory authority that throws any light on this question. Obviously, the legislative intent must govern and we cannot interpret these provisions so as to create an absurd and unintended situation.

In our view, the provisions of Section 114.040 cannot be interpreted as prohibiting the registration of voters and the conduct of elections pursuant to Chapter 114 prior to the fifteenth of September next following the adoption of local option registration. If such were the case, the provision of Section 114.010, which makes the law operative upon publication of adoption, would be a nullity. It appears, therefore, that the mandate that there be a registration of voters beginning on the fifteenth day of September following adoption means no more than

Honorable Gary W. Fleming

that registration must begin by that date. Any other conclusion would ascribe an intent to the legislature to delay the operative date of the act until the fifteenth of September following the adoption at the prior general election at which the question is submitted under Section 114.010.

Further, it is our view that the provision for beginning registration on the fifteenth of September following adoption of Chapter 114 is only directory and not mandatory because no statutory provision is found which nullifies action not in accordance with such provision.

It is therefore our view that county local option registration under Chapter 114 may begin any time after publication of notice of adoption when the law becomes operative and must begin the fifteenth of September following adoption. In either case initial registration must be preceded by notice under Section 114.070, and concluded as soon as possible. After such registration is concluded, voter registration is required for elections covered by Chapter 114.

#### CONCLUSION

It is the opinion of this office that county local option registration under Chapter 114, RSMo, may begin at any time after the law becomes operative following publication of the adoption of local option registration and must begin by the fifteenth day of September following such adoption. Such registration must be concluded as soon as possible. Voter registration is required for elections covered by Chapter 114 after voter registration is concluded.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

June 1, 1973

OPINION LETTER NO. 145  
Answer by letter-Klaffenbach



Honorable Walter H. Mueller, Jr.  
Representative, District 93  
Room 101D, Capitol Building  
Jefferson City, Missouri 65101

Dear Representative Mueller:

This letter is in response to your opinion request in which you ask:

"A question has arisen in a city of the 4th class as to whether or not the Mayor, the aldermanic representative and the City Engineer, or some similar City official have a right to vote on matters coming before the Planning and Zoning Commission.

"In the event they do have a right to vote, a further question arises as to whether or not the right to vote enjoyed by 'the City Engineer or some similar City official' is destroyed by reason of the fact that he is not a resident of the city of the 4th class in which he holds office."

We also understand from the city attorney of the city involved that the person holding the city office of "director of public works" is sitting as a member of the commission although he is not voting because he is a nonresident of the city and that the person employed as "city engineer" who is also a nonresident is not considered a member of the commission although he is attending meetings in an advisory capacity.

Section 89.320, RSMo, provides:

Honorable Walter H. Mueller, Jr.

"The planning commission of any municipality shall consist of not more than fifteen nor less than seven members, including the mayor, a member of the council selected by the council, the city engineer or similar city official and not more than twelve nor less than four citizens appointed by the mayor and approved by the council. All citizen members of the commission shall serve without compensation. The term of each of the citizen members shall be for four years, except that the terms of the citizen members first appointed shall be for varying periods so that succeeding terms will be staggered. Any vacancy in a membership shall be filled for the unexpired term by appointment as aforesaid. The council may remove any citizen member for cause stated in writing and after public hearing."

Our analysis of the sections in question lead us to the conclusion that all members of the commission have a right to vote on matters coming before the commission. Thus, it is our view that the mayor, the member of the city council selected by the council, and the city engineer ("or similar city official") have the right to vote on all such issues. We assume in reaching this conclusion that the planning commission is formed under the provisions of Section 89.320, quoted above, and is not a commission within the exception of subsection 2 of Section 89.330, RSMo, respecting zoning or planning commissions existing on October 13, 1963.

It is further our view that under Section 89.320 the city engineer and not the "director of public works" is the officer who is properly the ex-officio member of the commission. We reach this conclusion because the section refers to "the city engineer or similar city official." We take this language to mean that if there is a "city engineer" the legislature intended that such officer be a member of the commission and that the language "or similar city official" is applicable to designate the officer who acts as or performs the duties of a city engineer when there is no office of "city engineer" as such. Notably, in this respect Section 89.320 authorizes the council to select a member of the council to serve on the commission but does not speak in terms of selection with respect to the membership of "the city engineer or similar city official."

The next question is whether the city engineer as a member of the commission is unable to vote if he is not a resident of the city.

Section 79.250, RSMo, provides:

Honorable Walter H. Mueller, Jr.

"All officers elected or appointed to offices under the city government shall be qualified voters under the laws and constitution of this state and the ordinances of the city except that appointed police officers, the city attorney, and other employees having only ministerial duties need not be registered voters of the city. No person shall be elected or appointed to any office who shall at the time be in arrears for any unpaid city taxes, or forfeiture or defalcation in office. All officers, except appointed police officers, the city attorney, and other employees having only ministerial duties, shall be residents of the city."

While it is questionable that the duties of city engineer as such are other than ministerial (and we do not have a precise description of the city engineer's duties), it is clear that a voting member of the commission is exercising a part of the sovereign function and such a member is not an employee "having only ministerial duties." Therefore, it is our view that since the city engineer is a member of the commission under the provisions of Section 89.320 he must be a resident of the city.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

April 19, 1973

OPINION LETTER NO. 147  
Answer by letter-Wieler

Honorable William Dick Fickle  
Prosecuting Attorney  
Platte County  
Post Office Box B  
Platte City, Missouri 64079



Dear Mr. Fickle:

This is in response to your request for an opinion as to whether or not a county judge is disqualified from holding his office when he is employed by a corporation which has large property holdings in the county.

There are no constitutional or statutory provisions which would disqualify a person for the office of county judge because of private employment. The mere fact that a county judge is employed by a private entity with large property holdings in a county is not grounds for disqualification of his office.

However, this does not mean that a county judge is free to participate in decisions which affect his employer. Section 49.220, RSMo 1969, provides for transfer of a cause or proceeding pending before the county court to the circuit court of the county when a majority of the judges of the county court have a personal interest in the cause or proceeding. This statute has been interpreted to mean that no judge of the county court shall sit in any case or proceeding in which he has a personal interest, or when he is related to either party. Wheeler v. Weston Special Benefit Assessment Road District of Platte County, 294 S.W.2d 353, 356 (K.C. Ct.App. 1956). While county courts are no longer courts of record, we believe that the canons of ethics applicable to judges of courts of record provide a guideline for conduct by county court judges who are charged with the conduct of county affairs. Rule 2.04 of the Supreme Court Rules provides as follows:

Honorable William Dick Fickle

"A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach."

In our opinion, the relationship between an employer and an employee is such that a county judge should disqualify himself in any hearing or proceeding before the county court in which the outcome would directly affect the judge's private employer.

Yours very truly,

JOHN C. DANFORTH  
Attorney General



SCHOOLS:  
SCHOOL DISTRICTS:  
TAXATION (SCHOOLS):  
SPECIAL SCHOOL DISTRICTS:

A special school district formed under the provisions of House Bill 1096, 76th General Assembly, Sections 178.640-178.765, V.A.M.S. (1) would immediately upon formation become responsible for providing

vocational education and special education for physically and mentally handicapped children resident within the county or counties included in the special district; however, the board of education of a special district would be required to accomplish at any given time only that which is reasonably possible; (2) would have no legal obligation to employ special education teachers under contract by component districts at the time of formation of the special district; (3) should present an estimate of the amount of money to be raised by taxation for the ensuing school year and the tax rate necessary to sustain the schools of the special district for the ensuing school year to the county clerk of each county included within the special district on or before July 15; and (4) may secure special educational services and vocational training services for children within its boundaries by contracting with any school district which has authority to furnish such services. If House Bill 474, 77th General Assembly, is signed by the Governor, it will not affect the organization or existence of an already existing special district, but will govern the operations of all special districts.

OPINION NO. 149

July 11, 1973

Honorable Vic Downing  
State Representative, 162nd District  
Rural Route 1  
Bragg City, Missouri 63827



Dear Representative Downing:

This opinion is issued in response to your request for a ruling on the following questions:

"1. At what point and time must a special district formed under provisions of HB 1096 assume the responsibilities of providing education and training of physically and mentally handicapped children and vocational education as called for in Section 178.640(1) of the Act?

Honorable Vic Downing

"2. Would a special school district formed under provisions of HB 1096 have any obligation to employ special education teachers under contract by the component districts at the time of formation of the special district?

"3. What is the latest date in a calendar year that a special district can be formed and still be eligible to levy and collect taxes for that year? Would a special district approved by the voters in January be eligible to collect taxes for that year?

"4. Would the board of education of the special district have the authority to contract with districts not included in the special district for either special education or vocational services?

"5. If HB 474, as perfected by the House, is enacted by the General Assembly and becomes law, what effect will it have on districts formed under provisions of HB 1096?"

For the purposes of answering the foregoing questions, we will assume that a special school district has been legally organized under the provisions of Sections 178.640 through 178.765, V.A.M.S. (House Bill 1096, 76th General Assembly, Second Regular Session).

#### Question No. 1

You inquire as to when a special school district formed under the provisions of House Bill 1096 must begin providing services for physically and mentally handicapped children and when the district must begin providing vocational training.

All children in the State of Missouri are entitled to gratuitous instruction in free public schools established and maintained by the General Assembly. Article IX, Section 1(a), Missouri Constitution, 1945. In implementing this constitu-

Honorable Vic Downing

tional mandate, the Missouri General Assembly has authorized the creation of school districts. Under Section 178.760, the board of education of each school district, except counties in which special school districts have been organized, shall provide appropriate instruction for exceptional children. Where special school districts have been organized, Section 178.640, subsection 5, provides:

"The special school district shall provide free vocational instruction, classes or schools for children under the age of twenty-one years, resident within the district's boundaries, in addition to the program of providing free instruction, classes, school or schools, for children under the age of twenty-one years, resident within the district, who are physically or mentally handicapped, . . ."

In subsection 5, the mandatory "shall" rather than the permissive "may" is used. Because of the provisions of Section 178.760 providing that when a special district has been formed neither the State Board of Education nor any existing school district within the county shall be required to establish schools or classes within the county for the training or education of handicapped children, it would appear that the legislature intended that special districts, when formed, would take over the responsibility of providing this education.

Therefore, we conclude that as soon as a special school district is formed, it is responsible for providing special and vocational educational services for children living in the special district. The board of education of the special school district should immediately after formation of the district make a good faith and reasonable attempt to provide these educational services. If, because of lack of facilities or inability to obtain teachers or for any other legitimate reason, the board of education of the special school district cannot begin providing immediately these services for children resident within its boundaries, we do not believe that the board would be held responsible for not immediately providing a full program for all children.

In State ex rel. Rice v. Tompkins, 203 S.W.2d 881 (St.L. Ct. App. 1947), the voters in the Williamstown School District

Honorable Vic Downing

approved the proposition that free pupil transportation be furnished to and from the schools of the district. Relator contended that his daughter was entitled to free transportation to and from school on each school day regardless of inclement weather or muddy roads. The Court refused to adopt relator's position stating in part as follows:

"When transportation in a school district has been voted it is the duty of the Board of Directors or Board of Education to provide for such transportation, providing money is available in the incidental fund of the district to meet the expense thereof, and if the Board, without reasonable cause therefor, fails to provide transportation, it may be compelled to do so by mandamus. However, this does not mean that the court may by the hard and unyielding writ of mandamus substitute its discretion for that of the Board as to the means and manner and sufficiency and safety of the transportation to be furnished. . . ." Id. at 883.

\* \* \*

". . . The Board cannot be expected or required to do the impossible, and insure that each child is transported on each school day at all hazards and irrespective of weather and road conditions. If such was the mandatory duty of school directors it would be difficult to find a responsible person who would be willing to serve on a School Board." Id. at 884-885.

#### Question No. 2

You inquire whether, under the provisions of House Bill 1096, a special school district has an obligation to employ special education teachers under contract with the school districts which make up the special school district.

Honorable Vic Downing

As previously noted, Section 178.760 provides that once a special school district is formed component school districts within the county are not required to establish schools or classes for the training or education of handicapped children. We have been unable to locate any statutory provision which would place on the board of education of the special school district any legal obligation to employ special education teachers, under contract by component districts, at the time of the formation of the special school district.

Question No. 3

As we understand this question, you are particularly interested in whether a special school district approved by the voters in January would be eligible to levy and collect taxes for the year in which it was formed.

Under Section 178.640, subsection 3, a special school district is subject to all constitutional provisions and laws applicable to the organization and government of six-director school districts other than urban districts. Under Section 164.011, RSMo 1969, as amended, the board of education is required to prepare an estimate of the amount of money to be raised by taxation for the ensuing year and to designate the tax rate required to produce the amount necessary to sustain the schools of the district for the ensuing year. This estimate shall be forwarded to the county clerk on or before July 15. If the school district is divided by a county line, the estimate should be forwarded to the county clerk of each county in which any part of the district lies. Thereafter, the county clerk is required to assess the rate returned against all taxable property in the district and to extend the taxes on the tax books. Section 164.041, RSMo 1969.

Assuming that voter approval is obtained, the board of education of the special school district may initially "impose a property tax not to exceed the annual rate of 25 cents on the hundred dollar assessed valuation. . . ." See Sections 178.660 and 178.700. The board of education should, prior to July 15, forward to the county clerk of the counties included in the special school district, the annual estimate referred to in Section 164.011, and should set a tax rate sufficient to produce the income required (initially not in excess of 25 cents per one hundred dollars assessed valuation).

Honorable Vic Downing

Question No. 4

You inquire as to whether the special school district can contract with other school districts to provide special educational services or vocational training services for the residents of the special district.

Under Section 70.220, RSMo 1969, the legislature has authorized political subdivisions to cooperate with each other.

"Political subdivisions may cooperate with each other, with other states, the United States or private persons. -- Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides."



Honorable Vic Downing

Special school districts are political subdivisions for the purposes of Section 70.220. See Sections 70.210, RSMo 1969 and 178.640, V.A.M.S.

Therefore, we conclude that a special school district may secure special educational services and vocational training services for the children living within its boundaries by contracting with any school district which has the authority to provide such services.

#### Question No. 5

House Bill No. 474, 77th General Assembly, as enacted by the General Assembly, but not yet signed by the Governor, provides in part as follows:

"Section 35. Special school districts already in existence when this Act takes effect are not effected (sic) by the organizational provisions included herein but shall operate henceforth under the provisions of this Act."

Therefore, we believe that if House Bill 474 is signed by the Governor, it will affect only the operation of special school districts formed under the provisions of House Bill 1096 and will not affect the organization or existence of existing special districts.

#### CONCLUSION

Therefore, it is the opinion of this office that a special school district formed under the provisions of House Bill 1096, 76th General Assembly, Sections 178.640-178.765, V.A.M.S., (1) would immediately upon formation become responsible for providing education for physically and mentally handicapped children and vocational training for children resident within the county or counties included in the special district; however, the board of education of a special district would be required to provide at any given time only those services which are reasonably possible; (2) would have no legal obligation to employ special education teachers under contract by component districts at the time of formation of the special district; (3) should present to the county clerk of each county included within the special dis-



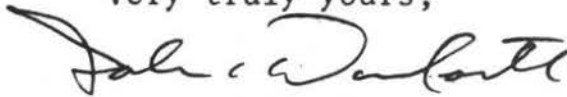
Honorable Vic Downing

trict on or before July 15, an estimate of the amount of money to be raised by taxation for the ensuing school year and the tax rate necessary to sustain the schools of the special district for the ensuing school year; and (4) may secure special educational services and vocational training services for children within its boundaries by contracting with any school district which has authority to furnish such services.

If House Bill 474, 77th General Assembly, is signed by the Governor, it will not affect the organization or existence of an already existing special district, but will govern the operations of all special districts.

The foregoing legal opinion, which I hereby approve, was prepared by my assistant, D. Brook Bartlett.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

April 19, 1973

OPINION LETTER NO. 150  
Answer by letter-C.A. Blackmar

Honorable Clifford B. Mayberry  
Prosecuting Attorney  
Adair County  
213 West Washington  
Kirksville, Missouri 63501



Dear Mr. Mayberry:

This is in response to your request for an opinion on the following question:

"Is a Uniform Traffic Ticket as provided for in Supreme Court Rule 37.1162 sufficient to charge a non-traffic misdemeanor, when properly signed by any law enforcement officer including Sheriffs, members of the Missouri Highway Patrol, and officers of the Police Department of a city of the third class, as the information of the prosecutor."

In your opinion request you go on to state:

"Members of the Missouri Highway Patrol and others have occasion in the performance of their assigned duties to come across non-traffic violations. For example, the officer in the investigation of a possible DWI may find minors in possession of alcoholic beverages, the officer makes his affidavit on the Uniform Traffic Ticket; the prosecutor signs same making it his information."

Supreme Court Rule 24.01 provides:

Honorable Clifford B. Mayberry

"The . . . information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the prosecuting attorney, . . . It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. . . ."

Supreme Court Rule 37.46 provides for the use of the "Uniform Traffic Ticket" in traffic cases. A portion of the Uniform Traffic Ticket constitutes the information in such cases. While no provision of the Supreme Court Rules authorizes the use of the Uniform Traffic Ticket with respect to nontraffic offenses, if a Uniform Traffic Ticket were filled out so as to comply with Supreme Court Rule 24.01, it would serve as a valid information to charge a nontraffic misdemeanor.

One caveat should be added to this opinion: By holding that the Uniform Traffic Ticket properly filled out could serve as an information to charge a nontraffic misdemeanor, this office expresses no view as to the desirability of such practice. We enclose a copy of Opinion No. 27, 1964, wherein the use of the Uniform Traffic Ticket as an information is discussed.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 27  
6-24-64, Gepford

BOATS:  
CONSTITUTIONAL LAW:  
MISSOURI BOAT COMMISSION:

Senate Bill No. 123 of the 76th  
General Assembly, enacting a new  
Section 306.260 relating to marine  
toilets on boats, is constitutional.

OPINION NO. 151

May 3, 1973

Mr. John V. Buford  
Executive Secretary  
Missouri Boat Commission  
Post Office Box 603  
Jefferson City, Missouri 65101



Dear Mr. Buford:

You recently asked this office to issue an official opinion on the constitutionality of Senate Bill No. 123 of the 76th General Assembly, relating to marine toilets. That Act repealed the previously existing Section 306.260, RSMo 1969, and added a new section, to read as follows:

"All marine toilets on any boat, operated upon [the] waters of the state, shall be so constructed and operated as to contain all sewage aboard the boat and not to discharge any sewage into the waters directly or indirectly. No boat shall be equipped to permit discharge from or through any marine toilet, or in any other manner, any sewage at any time into [the] waters of the state, and all sewage when removed from any boat shall immediately be placed in an approved septic tank, sanitary lagoon or sewage treatment system. The provisions of sections 306.250 to 306.290 shall not apply to boats engaged in interstate commerce on the Missouri and Mississippi rivers."

In your opinion request you further state that you have received complaints charging that this law is discriminatory as to the operation of certain vessels upon state waters. You further state that:

". . . It is natural to assume that all vessels will not be equipped with marine toilets, only those vessels large enough to accommodate lodging and overnight stops on the waters of this state."

Mr. John V. Buford

The comments accompanying your opinion request indicate that, apparently, contentions have been raised concerning the possible contravention of the Fourteenth Amendment of the United States Constitution and Article I, Sections 2 and 10 of the Missouri Constitution, the provisions guaranteeing due process and equal protection of laws.

In any question involving the constitutionality of statutes, we must start from the initial premise that the legislature is presumed to have enacted constitutional measures. Phillips v. The Missouri Pacific Railway Company, 86 Mo. 540 (1885). Any person attacking the constitutional validity of a statute must establish the unconstitutionality beyond a reasonable doubt, and any remaining doubt as to constitutionality must be resolved in favor of the statute's validity. Graves v. Purcell, 85 S.W.2d 543 (Mo. banc 1935). Your letter has stated no facts that would indicate that this statute is unconstitutional.

The legislative enactment in question is clearly designed to enhance the public health and welfare of the citizens of this state and persons using this state's waters. The legislature of this state, on numerous occasions, has enacted legislation designed to prevent pollution. The exercise of legislative authority to promote public health and welfare is an exercise of the police power of the state.

In describing the limitations imposed upon the exercise of police power by the constitutional guarantee of due process, the Missouri Supreme Court, in Clutter v. Blankenship, 144 S.W.2d 119 (Mo. 1940), stated:

" . . . An action by a state through its legislature, its executive or its judiciary in the proper exercise of the police power, even though it may interfere with the liberty or property of an individual, constitutes due process. True such interference must not be arbitrary, unreasonable or a despotic spoliation of vested rights, and it must reasonably tend to protect and promote the public morals, peace, health, safety and general welfare; but if an exercise of police power meets these tests, it will not be held to violate the requirements of the due process clause even though it does interfere with the property rights of a citizen. . . ." (at 121)

No conceivable state of facts comes to mind that would indicate that one's due process guarantees are abridged by the provision

Mr. John V. Buford

in question. Indeed, the control of excremental wastes has been termed the "commonest exercise of the police power of a state." Hutchinson v. City of Valdosta, 227 U.S. 303, 308, 57 L.Ed. 520 (1913). To paraphrase the United States Supreme Court's decision in Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 488, 99 L.Ed. 563 (1955), "the day is gone when a court uses the due process clause of the Fourteenth Amendment to strike down state laws," regulatory of health and welfare conditions, "because they may be unwise, improvident or out of harmony with a particular school of thought."

A contention that Senate Bill No. 123 of the 76th General Assembly violates the equal protection guarantees of the United States and Missouri Constitutions is equally frivolous. The equal protection clauses of the Constitutions require only that the means and methods be applied impartially to all the constituents of each class, so that the laws will operate equally and uniformly on all persons under all circumstances. Further, the state may make reasonable classifications of persons or things for the various purposes of legislation. If there is a reasonable basis for the classification, and the law operates equally on all within the same class, it is valid. E.g., Hull v. Baumann, 131 S.W.2d 721, 726 (Mo. 1939); State v. Brodnax, 128 S.W. 177 (Mo. 1910), aff'd 219 U.S. 284, 55 L.Ed. 219 (1911).

The uniform operation of this law is apparent on its face. The law applies to "all marine toilets on any boat operated upon the waters of this state." The class affected by this legislation is that of boats possessing marine toilets, operating on the waters of this state. The law clearly operates equally on all within the same class, and is thus valid. The class selected is broad, and clearly not unreasonable. The law does not purport to deal with all vessels but that does not render it constitutionally infirm because the effect of the law is to comprehensively control those vessels having marine toilets. The exclusion from the scope of this provision of vessels engaged in interstate commerce on the Missouri and Mississippi rivers does not render the law constitutionally infirm as such vessels merely constitute a separate class, which the legislature undoubtedly believed would be subject to federal regulation and possibly exempt from state regulation.

#### CONCLUSION

It is the opinion of this office that Senate Bill No. 123 of the 76th General Assembly, enacting a new Section 306.260 relating to marine toilets on boats, is constitutional.

Mr. John V. Buford

The foregoing opinion, which I hereby approve, was prepared by my assistant, Peter H. Ruger.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

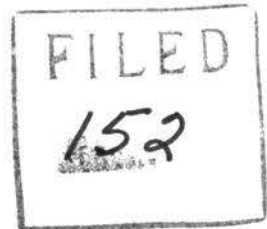
JOHN C. DANFORTH  
Attorney General



May 11, 1973

OPINION LETTER NO. 152  
Answer by letter-Houdek

Honorable William J. Esely  
State Senator, District 12  
Room 433, Capitol Building  
Jefferson City, Missouri 65101



Dear Senator Esely:

This opinion is in response to your request in which you ask the following:

"1. Can a person who has served not less than twelve years as a circuit judge, then retired under the provisions of Sec. 476.450, served as a special commissioner several years and resigned as such, his resignation to the Governor which was accepted, containing the provision that he might reapply at any future time for judicial retirement, and then appointed Probate & Magistrate Judge, and now serving as such, terminate his services as the latter judge and successfully reapply for retirement benefits and if so, be paid fifty percent of the salary for the highest court upon which he has served.

"2. In the event of the death of a retired judge under the next above circumstances leaving a qualified widow, would her benefits be based upon the services of her deceased husband as Probate and Magistrate Judge only, or upon his full twelve years services on both circuit and Probate courts, and at what rate."

Additionally, you have provided us with the following facts giving rise to your inquiry:

Honorable William J. Esely

"Judge Virgil C. Rose served as Judge of the Third Judicial Circuit of Missouri from January 2, 1939 until January 5, 1959, a twenty year period, then in 1967 upon reaching the age of sixty-five, applied for and received retirement under the then provisions of Sec. 476.450 until February 1, 1972, at which time having resigned to the Governor as a Special Commissioner with the provision that such resignation was without prejudice to again applying for benefits under the provisions of the judicial retirement system of Missouri, same was accepted by the Governor and Judge Rose was thereupon on February 1, 1972 appointed Judge of the Probate and Magistrate Court of Putnam County, Missouri and has since and now is serving as such Judge.

"The Judge has served actively after Sept. 3, 1970, (but was not in office on that date except as special commissioner).

"Since Feb. 1, 1972, the Judge has participated in and made regular contributions under the provisions of Sec. 476.525

Total combination service over	
21 years	(Note 476.520)
Contributions deducted, Probate & Magistrate,	476.570
Retirement Compensation, highest for court on which retiree serves as full time judge	476.530
Survivors benefits	476.535"

The pertinent statutory provisions bearing on your questions are contained in Sections 476.515, RSMo Supp. 1971 et seq., which provides in pertinent part as follows:

"As used in sections 476.515 to 476.570, unless the context clearly indicates otherwise, the following terms mean:

(1) 'Beneficiary', an unremarried surviving spouse married to the deceased judge continuously for a period of at least two years immediately preceding his death and also on

Honorable William J. Esely

the day of the last termination of his employment as a judge, or if there is no surviving spouse eligible to receive benefits under sections 476.515 to 476.570, the term 'beneficiary' shall mean any unemancipated minor child of the deceased judge, who shall share in the benefits on an equal basis with all other beneficiaries;

(2) 'Benefit', a series of equal monthly payments payable during the life of a judge retiring under the provisions of sections 476.515 to 476.570 or payable to a beneficiary as provided in sections 476.515 to 476.570; all benefits paid under sections 476.515 to 476.570 in excess of any contributions made to the system by a judge shall be considered to be a part of the compensation provided a judge for his services;

\* \* \*

(4) 'Judge', any person who has served or is serving as a judge or commissioner of the supreme court or of the court of appeals, or as a judge of any circuit court, probate court, magistrate court, court of common pleas or court of criminal corrections of this state or as a justice of the peace;" Section 476.515

"Any person, sixty-five years of age or older, who has served in this state an aggregate of twelve years, continuously or otherwise, as a judge, and who, after September 3, 1970, ceased or ceases to hold office by reason of the expiration of his term, voluntary resignation, or retirement under the provisions of subsection 2 of section 27 of article V of the Constitution of Missouri may receive benefits as provided in sections 476.515 to 476.570. All judges required by the provisions of section 30 of article V of the constitution to retire at the age of seventy years shall retire upon reaching that age, and if they have served in this state an aggregate of twelve years, continuously or otherwise, as a judge, shall receive benefits as provided in sections 476.515 to 476.570. The twelve years requirement of this section may be fulfilled by service as

Honorable William J. Esely

judge in any of the courts covered, or by service in any combination as judge of such courts, totaling an aggregate of twelve years." Section 476.520

"The retirement compensation shall be equal to fifty percent of the compensation provided by law at the time of retirement for the judges of the highest court on which the retired judge served as a full-time judge. Retirement compensation shall be paid to the retired judge monthly during the remainder of his life." Section 476.530

"In the event a person who is serving as a judge as defined in section 476.515, or who has retired under the provisions of sections 476.515 to 476.570, dies, retirement compensation, in the amount equal to fifty percent of the amount of the retirement compensation provided in section 476.530 or 476.545 shall be paid in monthly installments to his beneficiary." Section 476.535

"Any judge who held office on or after September 3, 1970, and who is otherwise eligible, shall participate in the retirement system established by sections 476.515 to 476.570; except that, a judge holding office on September 3, 1970, shall have the option to elect to participate in the retirement system established by sections 476.450 through 476.510, RSMo 1969. The election shall be in writing on forms prescribed by the comptroller, shall be filed with him within sixty days after September 28, 1971, and shall be irrevocable. The provisions of sections 476.450 through 476.510, RSMo 1969, shall apply to all other persons qualifying thereunder." Section 476.570

This office held in an official opinion to John C. Vaughn dated October 28, 1971, that a judge who did not serve in office after the effective date of H.C.S.S.C.S.S.B. No. 132, 76th General Assembly, is not eligible for benefits under such bill.

Honorable William J. Esely

Thus, the following are prerequisites for retirement benefits provided in Sections 476.515 to 476.570, RSMo Supp. 1971: (1) sixty-five years of age or older; (2) an aggregate of twelve years service as a judge; (3) voluntary resignation or retirement from service as a judge after September 28, 1971, the effective date of the act. If the individual meets these stated requirements, he is then eligible for retirement.

The above opinion also held that there is no requirement that all twelve years of service be subsequent to the effective date of Sections 476.515 to 476.570 and the prior service as circuit judge may be credited against that requirement. Service as probate judge constitutes service as a judge under the definition found in Section 476.515(4), RSMo. Any voluntary resignation or retirement from present service would be after September 28, 1971, thus fulfilling the final requirement.

Section 476.530 provides for the computation of retirement compensation. In your inquiry you specify that the individual served as a circuit judge which is the highest court on which he served as a full-time judge. This service would set the level of compensation to be used in determining the amount to be paid. The salary for circuit judge in the circuit in which he served on the date of any future retirement from the office of probate judge would fix the amount to be used in determining the compensation.

It is thus our opinion that a judge with in excess of twelve years service on the circuit bench who has retired and served as a special commissioner, resigned that commission and been appointed and served as probate and magistrate judge subsequent to September 28, 1971, may terminate his service by voluntary resignation or retirement and successfully apply for benefits as provided for in Sections 476.515 to 476.570 and be paid fifty percent of the salary for a circuit judge of the circuit in which he served on the date of his retirement from the probate court.

Your second question is answered by the provisions of Section 476.535, RSMo Supp. 1971, which provides that the qualified widow's benefits would be fifty percent of those provided for by Section 476.530, RSMo Supp. 1971. As we have held that the judge's retirement benefits under that section would be fifty percent of the salary for circuit judge in the circuit in which he served on the date of his retirement from the probate court, the qualified widow's benefit would thus be twenty-five percent of the salary of such circuit judge on the date of the judge's retirement from the probate court.

It is the view of this office with respect to Sections 476.515 to 476.570 relating to the retirement of judges that:

Honorable William J. Esely

1. A judge with more than twelve year's service on the circuit bench who has retired and served as a special commissioner, resigned that commission and been appointed and served as probate judge subsequent to September 28, 1971, may terminate his service by voluntary resignation or retirement and successfully apply for benefits as provided for in Sections 476.515 to 476.570 and be paid fifty percent of the salary for circuit judge in the circuit in which he served on the date of his retirement from the probate court.

2. In the event of the death of a retired judge under the next above circumstances, a qualified widow would be entitled to benefits in the amount of fifty percent of fifty percent of the salary of such circuit judge on the date of the deceased judge's retirement from the probate court.

Yours very truly,

JOHN C. DANFORTH  
Attorney General



SCHOOLS:  
CONTRACTS:  
CONSTITUTIONAL LAW:

Section 38(a) and Section 39(3),  
Article III, Missouri Constitu-  
tion, prohibit a school board and  
the district superintendent from

terminating a partially performed three-year contract and execu-  
ting a new contract providing for the performance of the same du-  
ties at a greater compensation when the only reason for doing so  
is an increase in the number of students attending the school  
district.

OPINION NO. 157

October 2, 1973



Honorable Joseph S. Kenton  
Representative, District 32  
8553 Holmes  
Kansas City, Missouri 64131

Dear Representative Kenton:

This official opinion is issued in response to your request  
for a ruling on the following questions:

"1. Does an increase in enrollment in  
a school district constitute additional du-  
ties for a school superintendent as stated  
in opinion No. 171 which was issued May 4,  
1971 to Rep. Gralike.

"2. If this does constitute additional  
duties, then is a school board justified to  
give a school superintendent a 10% salary in-  
crease in the middle of a three-year contract  
if the school's enrollment increases by 10%."

The following facts were furnished in the opinion request:

"It has been the practice of many school  
districts to hire a superintendent on a three-  
year contract; then before the school board  
election in the spring, the superintendent is  
given a one year extension on his contract with  
an additional raise. What with the term of a  
school board member being only three years,  
this tends to prevent the people from having  
a voice in the selection and retention of the  
school superintendent.



Honorable Joseph S. Kenton

"When challenged on this issue, the members of the school board defend their position by saying that the school's enrollment increases every year so that the superintendent's salary should be increased because he is in charge of a larger school system each year.

"Taking into consideration these factors, does an increase in enrollment constitute the additional duties required in Opinion No. 171; and if so, can the salary increase be calibrated to the amount of enrollment increase."

QUESTION NO. 1

In question No. 1, you refer to Attorney General's Opinion No. 171 to the Honorable Donald J. Gralike issued May 4, 1971. On several occasions in Opinion No. 171, we noted that the school board therein had sought during the term of a three-year contract to increase the superintendent's compensation without altering the nature of his obligation to the district. See, for instance, pages 2, 3, and 5. We concluded that under the circumstances set forth in Attorney General's Opinion No. 171, any attempt to increase the superintendent's compensation for performing duties he was already obligated to perform would violate Sections 38(a) and 39(3) of Article III of the Missouri Constitution.

Your question is whether an increase in enrollment in a school district would constitute different duties so as to justify increasing a superintendent's compensation during the term of a three-year contract. We do not believe it would.

In Attorney General's Opinion No. 171 and Attorney General's Opinion No. 211 dated May 6, 1970, to the Honorable Ronald M. Belt, reliance was placed on the Missouri Supreme Court decision in Kizior v. City of St. Joseph, 329 S.W.2d 605 (Mo. 1959). In this case a sanitation company had agreed with the city of St. Joseph to provide trash removal services for a ten-year period at a fixed compensation without any provision that would protect it from unexpected contingencies or greatly increased costs. The company argued that due to several unforeseen factors the contract had become burdensome and unprofitable. Specifically, it contended that the company's hog feeding operation had been damaged by the 1951 flood, that access to the company's hog feeding plant had become more difficult because of the flood, that Missouri was about ready to prohibit the feeding of raw garbage to hogs and that the cost of repairs, gas, and labor had increased by 11%. For these reasons, the city contended that it was justified in changing certain terms

Honorable Joseph S. Kenton

of the contract to benefit the company. One of the proposed changes was to increase the company's compensation for performing trash collection services.

The court found the city had no power to amend the existing contract stating, in part, as follows:

"A careful reading of the amendatory contract does not disclose that appellant agreed therein to do anything except 'to continue to collect and dispose of garbage in accordance with the contract [of July 12, 1949] hereinabove referred to.' Obviously, appellant was already bound to do that which it agreed to do in the agreement to amend. The stated purpose of the city in agreeing to the amendment was to make it possible for appellant to continue the garbage collection operation which appellant had found it impossible to do 'by reason of conditions beyond its control.' For doing that which appellant was already obligated to do under the original contract, the city agreed in the amendment to pay appellant at least \$19,000 annually in addition to the amount originally agreed upon. That clearly violated the quoted constitutional provision, as it was a 'grant' of 'extra compensation \* \* \* to a \* \* \* contractor after \* \* \* a contract has been entered into and performed \* \* \* in part.' Article III, Section 39(3), supra. . . ." Id. at 609.

The city also argued in Kizior that its contractor was confronted with circumstances which were not contemplated when the contract was entered into. Therefore, separate consideration existed for the amendatory contract. The court rejected this contention also.

". . . Certainly the fact that appellant may have entered into an improvident contract would afford no basis for creating an exception to the application of a clear constitutional prohibition. Section 39(3), Article III was adopted by the people as a safeguard against the squandering of public money and to prohibit public officers from giving gratuities to contractors, and it may not be cast aside even though one who has acted in good faith may suffer hardships. The courts

Honorable Joseph S. Kenton

of this state have adhered to a policy of strictly enforcing the constitutional and statutory safeguards applicable to the contracts of public corporations. . . ." Id. at 610.

The lesson of the Kizior case is that, unless provided for in the contract, increased costs of operation due to unforeseen circumstances will not furnish the basis for entering into an amendatory contract increasing the compensation to be paid a contractor for performing services he is already obligated to perform.

In the instant case, the superintendent agreed to provide certain services to the school district for a three-year period. Both the superintendent and the school board probably foresaw at the time the contract was entered into that the school population might increase over the term of the agreement. However, even if the number of students in the district increased unexpectedly during the term of the contract, no basis would be provided for increasing the superintendent's compensation for performing services he had already agreed to perform. The superintendent has agreed to perform the duties of superintendent for a period of years. Increase in the student population involves, at the most, an increase in duties of the general type he has agreed to perform. As in Kizior, the superintendent may have entered into "an improvident contract" which would not justify raising his salary.

#### QUESTION NO. 2

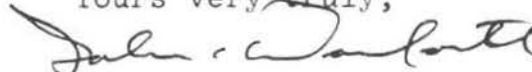
In view of our position on question No. 1, it is unnecessary to answer this question.

#### CONCLUSION

Therefore, it is the conclusion of this office that Section 38(a) and Section 39(3), Article III, Missouri Constitution, prohibit a school board and the district superintendent from terminating a partially performed three-year contract and executing a new contract providing for the performance of the same duties at a greater compensation when the only reason for doing so is an increase in the number of students attending the school district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 171, 5/4/71, Gralike  
Op. No. 211, 5/6/70, Belt



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH  
ATTORNEY GENERAL

April 9, 1973

OPINION LETTER NO. 160

Honorable Wesley A. Miller  
State Representative, District 121  
Room 235B Capitol Building  
Jefferson City, Missouri 65101

Dear Representative Miller:

This letter is in response to your question asking:

"Does the County Court of a Second Class County have the right to limit access on County roads either on existing roads or on such roads that may hereafter be condemned or acquired?"

You also state that:

"The County of Franklin is contemplating the construction of a County road from new Highway 100 to the western edge of the industrial tract of the city of Washington, Missouri. If the existing land owners or their successors are permitted unlimited access to this road it would greatly increase the amount of traffic to be carried by the proposed road and in addition would create added traffic hazards.

"There are also other roads in my jurisdiction being proposed which would have the same traffic problems if access is not controlled or limited."

We find no statutory authority for such a county to limit access to county roads. By comparison the State Highway Commission has such express authority with respect to state highways.

Honorable Wesley A. Miller

Missouri Constitution, Article IV, Section 29; Handlan-Buck Co. v. State Highway Commission, 315 S.W.2d 219 (Mo. 1958). Further, we find no case authority for limiting access to county roads.

It is therefore our view that the county court has no such authority.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name.

JOHN C. DANFORTH  
Attorney General

ORDINANCES:  
TAXATION (CITY SALES):

The one percent city sales tax act in the City of St. Louis is a valid levy after March 22, 1973, thus the Director of Revenue is required to continue to collect the tax.

OPINION NO. 163

July 24, 1973

Mr. James R. Spradling  
Director, Department of Revenue  
Room 401, Jefferson Building  
Jefferson City, Missouri 65101



Dear Mr. Spradling:

You submitted the following question to this office:

"Is the 1% city sales tax in the City of St. Louis a valid levy after March 22, 1973, such that the Director of Revenue can continue to collect the tax by requiring retailers to add it to their purchase price and thereafter remit it to the Department of Revenue?"

The answer to this question will be compelled by our answer to the basic question contained in this opinion request, whether the Board of Aldermen of the City of St. Louis can extend the city sales tax in the City of St. Louis for an additional year by passing an ordinance to that effect prior to the expiration of the prior year's extension but after the date stated in a prior ordinance for the enactment of legislation extending the operation of the act.

In 1970, pursuant to the authority granted by House Bill No. 243, enacted by the 75th General Assembly (now Section 94.500, RSMo 1969), the City of St. Louis submitted to the voters of that jurisdiction the question of whether they desired to levy a one percent city sales tax. The voters approved this levy on March 3, 1970.

The initial ordinance levying the sales tax provided for a two-year levy to commence at the time the sales tax could first be imposed. That date was July 1, 1970. In addition, Section IV of the ordinance provided:



Mr. James R. Spradling

" . . . and said sales tax shall remain in effect and be collected for a period of two (2) years only from its first effective date after which the tax imposed hereby shall expire, fail and be collected no longer unless, by ordinance enacted at least 90 days before the date of expiration as herein provided, said tax is extended for an additional year and, from year to year thereafter in like manner."

On March 23, 1972, the City of St. Louis enacted Ordinance No. 56154 which levied the sales tax for an additional year commencing March 23, 1972. However, this ordinance changed the termination date from July 1 to March 23, 1973. This ordinance incorporated by reference the provision from the prior ordinance that contained the requirement that the renewing ordinance be enacted at least ninety days before the date of expiration.

On February 13, 1973, Ordinance No. 56439, an ordinance extending the city sales tax for an additional year was enacted. Since the 1972 ordinance had changed the expiration date of the tax to March 22, 1973, this enactment was not accomplished within the 90-day limit established by the initial ordinance levying the city sales tax and incorporated by reference in subsequent ordinances thereafter.

Determinative of the issue in this case is the question of whether the action of a prior legislative body in enacting the 90-day provision could bind succeeding Boards of Aldermen from reenacting the city sales tax prior to the expiration date of prior ordinances. While this precise question has never been presented to an appellate court in this state, a number of analogous decisions have been rendered by the Missouri Supreme Court and the United States District Court for the Eastern District of Missouri. In the decisions of St. Joseph Board of Public Schools v. Gaylord, 86 Mo. 401 (1885); State ex rel. Heimberger v. Board of Curators of University of Missouri, 188 S.W. 128 (Mo. banc 1916); State ex rel. City of Springfield v. Smith, 125 S.W.2d 883 (Mo. banc 1939) and United States v. National Garment Co., 10 F.Supp. 104 (E.D. Mo. 1935), the principle that a legislative body could not, by mere enactment, restrict the legislative powers of any of its successors was enunciated. In this case, the Board of Aldermen of the City of St. Louis have the power to reenact the city sales tax ordinance prior to the expiration date thereof. The attempt to require that said enactment occur ninety days prior to the expiration date of the ordinance is an impermissible impingement upon the legislative power of succeeding Boards of Aldermen. Since this 90-day requirement is not compelled by either the Constitution or statutes of Missouri, or the City Charter, it is of no effect, in this case.



Mr. James R. Spradling

A leading treatise observed that:

"Statutes may authorize and direct cities or towns to change specified ordinances: . . . within a given time, to conform to law. In such new case new ordinances are not required but amendment of existing ordinances will answer. The change is valid although not made within the time prescribed." 6 McQuillen, Municipal Corporations, Section 21.02

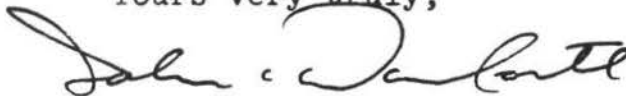
In a case in which the statute required that municipal ordinances be revised within one year, and a revision was not accomplished until after that date, it was held that the revision was not absolutely void because not made within the time specified. Lowry v. City of Lexington, 68 S.W. 1109 (Ky.App. 1902).

#### CONCLUSION

It is the opinion of this office that the one percent city sales tax act in the City of St. Louis is a valid levy after March 22, 1973, thus the Director of Revenue is required to continue to collect the tax.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Peter H. Ruger.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

April 9, 1973

OPINION LETTER NO. 164  
Answer by Letter - Klaffenbach

Honorable Jewel Kennedy  
State Representative, District 42  
Room 202I Capitol Building  
Jefferson City, Missouri 65101



Dear Mrs. Kennedy:

This letter is in answer to your opinion request in which you ask:

"Though a board of aldermen, consisting of 10 members, is short a member due to resignation or death, is a constitutional majority of 6 votes required to pass an ordinance?"

You also state that:

"For a period of time in February, 1973 the Raytown City Council was short a member. Subsequently an appointment filled this vacancy.

"The same problem now exists due to a council member being elected mayor on April 3, 1973. A special election will be held to fill this seat for a one year period. With a council of nine, is five a legal majority?"

Your question involves an interpretation of the provisions of Section 79.130, RSMo, respecting the manner in which ordinances are passed in fourth class cities. That section provides in part:

Honorable Jewel Kennedy

" . . . No ordinance shall be passed except by bill, and no bill shall become an ordinance unless on its final passage a majority of the members elected to the board of aldermen shall vote for it, and . . ."

In our Opinion No. 88, dated April 10, 1946, to Tindel, we held a state constitutional provision providing that a bill must be passed by a majority vote of all members elected to the House of Representatives and a majority of all members elected to the Senate, requires a majority vote of all members that have been elected to the Senate and House of Representatives and a subsequent vacancy does not affect the number that is required for the passage of such a bill.

We believe that the same rule applies in the premises.

See McQuillin, Municipal Corporations, §13.27b; McLean v. City of East St. Louis, 78 N.E. 815 (Ill. 1906); Pollasky v. Schmidt, 87 N.W. 1030 (Mich. 1901); 43 A.L.R.2d 702.

Therefore, where the board of aldermen consists of ten members a majority for passage of a bill consists of six members even though there is a vacancy.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 88  
4/10/46, Tindel

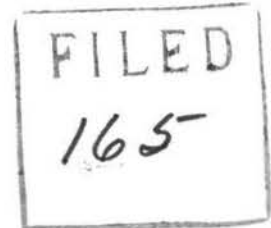
TAXATION:  
UTILITIES:  
ASSESSMENTS:  
COUNTY ASSESSOR:

The microwave station including the tower, equipment, and real estate on which it is situated owned by the American Telephone and Telegraph Company and located in Morgan County should be assessed by the county assessor of Morgan County.

OPINION NO. 165

May 30, 1973

Honorable Flavel J. Butts  
Representative, District 132  
Room 235A, Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Butts:

This is in response to your request for an opinion from this office as follows:

"Should the American Telephone and Telegraph Company pay taxes in Morgan County?

"Should the State Tax Commission notify the American Telephone and Telegraph that they have got to pay these taxes? Or should the Morgan County Court do so?

"The American Telephone and Telegraph Company owns about 1.47 acres of land in Sec 26, township 42, range 16 in Morgan County, Barnett, Missouri. The building and land is valued at about \$65,685.00. The microwave and tower estimated at \$272,000.00.

"I talked to Mr. Dan Williams of the Tax Commission about this. They ruled last year on this that they didn't have to pay taxes in Morgan County, but is undecided themselves, so they want an opinion also."

The answer to your question depends on whether the real estate together with the microwave equipment and tower located in Morgan County and owned by the American Telephone and Telegraph Company is to be valued and assessed by the county assessor of Morgan County or by the State Tax Commission.

Honorable Flavel J. Butts

It is a matter of common knowledge that the American Telephone and Telegraph Company is a public utility and some of the property they own is to be assessed by the State Tax Commission as provided by law for the assessment of property of a public utility.

From the information we have, the microwave station located in Morgan County has no tangible connection with other properties owned by the American Telephone and Telegraph Company such as telephone or telegraph poles together with the wires in other counties or taxing units of the state.

Public utilities are made subject to taxation, and the manner of their taxation is provided by Section 153.030, RSMo 1949. Paragraphs 1 and 2 of that section read as follows:

"1. All bridges over streams dividing this state from any other state owned, controlled, managed or leased by any person, corporation, railroad company or joint stock company, and all bridges across or over navigable streams within this state, where the charge is made for crossing the same, which are now constructed, which are in the course of construction, or which shall hereafter be constructed, and all property, real and tangible personal, owned by telegraph, telephone, electric power and light companies, electric transmission lines, pipe line companies and express companies shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons.

"2. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, county boards of equalization and the state tax commission are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization and state tax commission have or may hereafter be empowered with, in assessing, equalizing, and adjusting the taxes on railroad property; and the president or other authorized officer of any such bridge, telegraph,

Honorable Flavel J. Butts

telephone, electric power and light companies, electric transmission lines, pipe line companies, or express company or the owner of any such toll bridge, is hereby required to render statements of the property of such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, pipe line companies, or express companies in like manner as the president, or other authorized officer of the railroad company is now or may hereafter be required to render for the taxation of railroad property."

Since public utilities are to be taxed in the same manner as railroad companies, we turn to Chapter 151, RSMo 1949, and find that the State Tax Commission assesses property of railroad companies by authority of Section 151.060, RSMo 1949, which reads:

"1. The state tax commission shall assess, adjust and equalize the aggregate valuation of the property of each one of the railroad companies in this state specified in section 151.020.

"2. The commission shall have power to summon witnesses by process issued to any officer authorized to serve subpoenas, and shall have the power of a circuit court to compel the attendance of such witnesses, and to compel them to testify; they shall have the power, upon their knowledge, or such information as they can obtain, to increase or reduce the aggregate valuation of the property of any railroad company included in the statements and returns made by the railroad companies and the clerks of the county courts, and shall assess, adjust and equalize any other tangible property belonging to said railroad companies, or tangible property belonging to any railroad companies in this state of the kind specified in section 151.020, upon which no returns have been made, which may be otherwise known to them, as they deem just and right.

"3. In assessing, adjusting and equalizing any railroad property for any year or years the state tax commission may arrive at its finding, conclusion and judgment, upon its

Honorable Flavel J. Butts

knowledge, or such information as may be before it, and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the commission may think it is entitled to; provided, that when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company."

However, the State Tax Commission may assess only the distributable property of public utilities. In the case of State ex rel. Union Electric Light & Power Co. v. Baker, 316 Mo. 853, 293 S.W. 399, 402 (banc 1927), the court stated:

"In State ex rel. v. Hannibal & St. J. R. R. Co., 135 Mo. 618, 37 S. W. 532, we referred to the property designated in the first of these two statutes as 'distributable' property, and to that designated in the second as 'local' property. A distinction thus created between these two classes of property, for purposes of assessment and based upon the nature of the uses to which they are devoted, was indicated in State ex rel. v. C., R. I. & P. Ry. Co., 162 Mo. 391, loc. cit. 394, 63 S. W. 495, 496, as follows:

'The theory of the system of taxing railroads, as contained in our statute, seems to be that the railroad, with all the necessary appurtenances to its efficient equipment as a means of traffic, is to be taken as a whole and assessed for taxation by the state board of equalization. That does not, however, include property that is used by a railroad corporation as a collateral facility to its business, such as workshops, etc., nor property held for purposes other than those of a carrier, all of which is subject to taxation by the local authorities.'



Honorable Flavel J. Butts

Paragraph 1 of Section 151.020, RSMo 1949, reads:

"1. On or before the first day of May in each and every year, the president or any authorized officer of every railroad company whose road is now or which shall hereafter become so far completed and in operation as to run locomotive engines, with freight or passenger cars thereon, shall furnish to the state tax commission a statement, duly subscribed and sworn to by said president or other authorized officer, before some officer authorized to administer oaths, setting out in detail the total length of their road so far as completed, including branch or leased roads, the entire length in this state, and the length of double or sidetracks, with depots, water tanks and turntables, the length of such road, double or sidetracks in each county, municipal township, incorporated city, town or village through or in which it is located in this state; the total number of engines and cars of every kind and description, including all palace or sleeping cars, passenger and freight cars, and all other movable property owned, used or leased by them on the first day of January in each year, and the actual cash value thereof."

Section 151.100, RSMo 1949, reads:

"All real property, or tangible personal property, including lands, machine and workshops, roundhouses, warehouses and other buildings, goods, chattels and office furniture of whatever kind, and not herein specified, owned or controlled by any railroad company or corporation in this state, shall be assessed by the proper assessors in the several counties, cities, incorporated towns and villages wherein such property is located, under the general revenue laws of the state and the municipal laws regulating the assessments of other local property in such counties, cities, incorporated towns and villages, respectively, but the taxes on the property so assessed shall be levied and collected according to the provisions of this chapter."

Honorable Flavel J. Butts

The above statutes provide for taxation of property owned by public utilities which includes telegraph, telephone, electric power and light companies, electric transmission lines, pipeline companies, and express companies. This chapter expressly provides that the taxes levied on such property shall be levied and collected in the same manner as provided by law for the taxation of railroads in this state.

Under Chapter 151, RSMo, it is the duty of the State Tax Commission to place a value on all the property and to equalize the value of the property commonly-called distributable property to the different counties, cities, towns, school districts, and other political subdivisions which participate in the taxation of such property where the property is located. The statutes require the officials of the different companies to submit a list of all their property located in the different counties, cities, road districts, and so forth, which levy taxes on such property to the State Tax Commission to the clerk of the county court of each county in which such property is located. Under Section 151.080, RSMo, the State Tax Commission apportions the aggregate value of all the property to each county, city, road district, and so forth, in which the road is located according to the ratio of the number of miles in each county, city, road district, and so forth. It should be noted that the theory of taxation of railroad property is based on the fact that tangible property is located in the different counties, road districts, cities, and so forth, and that such counties and taxing units are to receive taxes on such property that is located within their boundaries. In the case of the railroads, the court has considered two classes of property--one local and the other distributable. The local property is to be assessed by the county assessor or township assessor while the distributable property is to be assessed by the State Tax Commission. In regard to railroads, the statute describes the property that is distributable. In general, it is movable property that has no permanent situs plus the tracks on which it runs. The State Tax Commission apportions the aggregate value of the distributable property to each county, city, and other taxing districts based on the percentage it bears to the total property and then the tax rate is levied locally based upon such value. This applies only to the property that is classified as distributable property. All other property belonging to the railroad is assessed under Section 151.100, RSMo, under the general revenue laws of the state and the municipal laws regulating the assessments of local property.

The fundamental question we have now is whether this microwave equipment should be classified as local property or as distributable property. It is located in the building in Morgan County and has no tangible connection with any other property belonging to the

Honorable Flavel J. Butts

American Telephone and Telegraph Company in Morgan County or in any other county, city or taxing district in the state. It is hard to see how this equipment can be classified as distributable property when this property is located in a specific area and has no connection with any other part of the telephone system. All the State Tax Commission does is value the distributable property for taxation and the tax is levied and is paid locally where the property is located. The tax is paid under all circumstances where the property is located whether it is distributable or not. The theory is that distributable property of a railroad has a situs in the taxing unit and the State Tax Commission determines its value for tax purposes and taxes are paid locally.

The microwave tower and equipment has no physical connection with any county other than the one it is located in. Therefore, it would be impossible to apportion the assessment value of such tower and related equipment among the various counties in the state. This being so, it is local in nature and must be assessed by the local county assessor.

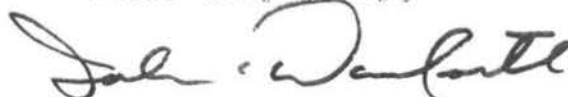
Section 137.095, RSMo, requires all real and tangible personal property of all corporations operating in this state shall be assessed and taxed in the county in which the property is situated. It is our view that real estate, the building, the tower, and the equipment of the American Telephone and Telegraph Company located in Morgan County should be assessed as real and tangible personal property in Morgan County by the county assessor of Morgan County.

#### CONCLUSION

It is the opinion of this office that the microwave station including the tower, equipment, and real estate on which it is situated owned by the American Telephone and Telegraph Company and located in Morgan County should be assessed by the county assessor of Morgan County.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

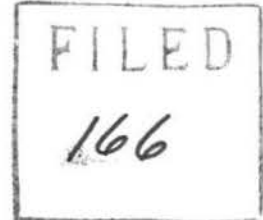
STATE FUNDS:  
BOARD OF FUND COMMISSIONERS:

The Board of Fund Commissioners  
may not transfer funds in the  
Second State Building Fund to  
general revenue.

OPINION NO. 166

May 14, 1973

Honorable James I. Spainhower  
Treasurer of Missouri  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Spainhower:

This is in response to your request for an opinion on the  
following question:

"Can the Board of Fund Commissioners transfer  
the balance in the demand checking account of  
the 2nd State Building Fund to General Revenue?"

Your opinion request goes on to note:

"The 2nd State Building Fund bonds were orig-  
inally issued in 1957 for a total amount of  
\$75,000,000.00. All of these funds have been  
expended with the exception of \$20,379.77  
remaining in the fund. There are no requi-  
sitions or obligations outstanding against  
this fund."

Article III, Section 37(a) of the State Constitution provides  
for the issuance of the Second State Building Fund Bonds. The  
proceeds of those bonds are to be used:

". . . for the purpose of repairing, remodel-  
ing or rebuilding, or of repairing, remodeling  
and rebuilding state buildings and properties  
at all or any of the penal, correctional and  
reformatory institutions of this state, the  
state training schools, state hospitals and  
state schools and other eleemosynary insti-  
tutions of this state, and institutions of  
higher education of this state, and for build-  
ing additions thereto and additional buildings  
where necessary, and for furnishing and equip-  
ping any such improvements."

Honorable James I. Spainhower

That section goes on to provide:

". . . The proceeds of the sale or sales of any bonds issued hereunder shall be paid into the state treasury and be credited to a fund to be designated the 'Second State Building Fund.'

"The proceeds of the sale of the bonds herein authorized shall be expended for the purposes for which the bonds are hereinabove authorized to be issued."

In connection with the issuance of the Second State Building Fund Bonds, the legislature enacted:

"An Act authorizing the issuance and sale of bonds to the amount of Seventy-five Million Dollars (\$75,000,000) for the state of Missouri in accordance with the provisions of Section 37(a), Article III of the Constitution of the State of Missouri; defining the powers and duties of the Board of Fund Commissioners of the State of Missouri . . ."  
Laws 1955, p. 769.

Sections 5 and 6 of that Act provide:

"Section 5. The moneys realized from the sale of bonds under the provisions of this act shall be paid into the state treasury, to the credit of the Second State Building Fund, and shall be appropriated by the general assembly for the purposes for which said bonds are hereinabove authorized to be issued and for the payment of all necessary expenses incidental thereto.

"Section 6. The State Treasurer, with the approval of said Board of Fund Commissioners, is authorized to deposit all of the moneys in the Second State Building Fund in any of the qualified state depositories of the state. All such deposits shall be secured in such manner and shall be made upon such terms and conditions as are now or may hereafter be provided for by law relative to state deposits. Any interest received on such deposits shall be credited to the Second State Building Fund."

Honorable James I. Spainhower

Thus it may be seen that both the Constitution and the Act of the General Assembly require that the proceeds from the issuance of the Second State Building Fund Bonds be placed in a special fund in the state treasury. Such proceeds are available for appropriation by the General Assembly for the purposes mentioned in the first quoted portion of Article III, Section 37(a). The Board of Fund Commissioners has no authority to transfer moneys in the separate fund to the general revenue fund.

Your opinion request indicates that the balance of the Second State Building Bond Fund is now held in demand deposits. Your attention is directed to Section 6 of the Act quoted above. That section permits you to invest the money now in the fund to earn interest to be credited to the fund.

#### CONCLUSION

It is the opinion of this office that the Board of Fund Commissioners may not transfer funds in the Second State Building Fund to general revenue.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Charles A. Blackmar.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

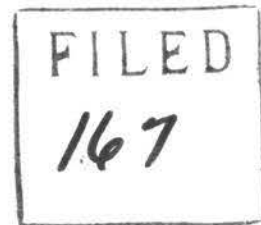
JOHN C. DANFORTH  
Attorney General



June 19, 1973

OPINION LETTER NO. 167  
Answer by letter-Card

Honorable C. David Darnold  
Prosecuting Attorney  
Vernon County  
Buckner Building  
Nevada, Missouri 64772



Dear Mr. Darnold:

This letter is in response to your request for an opinion asking whether the county court of Vernon County, Missouri, can enter into a contract with the city of Nevada, Missouri, under which the county court will provide county land for the purpose of construction by the city on such property of a city-county community recreational center.

Section 67.755, RSMo, reads in part as follows:

"1. The governing body of any political subdivision may provide, establish, equip, develop, operate, maintain and conduct a system of public recreation, including parks and other recreational grounds, playgrounds, recreational centers, swimming pools, and any and all other recreational areas, facilities and activities, and may do so by purchase, gift, lease, condemnation, exchange or otherwise, and may employ necessary personnel. Funds to be spent for such purposes may be set up in their respective budgets by any governing body."

Section 67.760, RSMo, reads as follows:

"Any two or more governing bodies may establish and conduct jointly a system of



Honorable C. David Darnold

public recreation and may exercise all the powers authorized by sections 67.750 to 67.780. The respective governing bodies administering programs jointly may provide by agreement among themselves for all matters connected with the programs and determine what items of cost and expense shall be paid by each."

Section 67.750(2), RSMo, defines "governing body" to include both a city council and a county court.

It is clear from the above statutes that the county and city can enter into an agreement to establish and conduct a system of public recreation. Under such an agreement the county court may provide the land. However, we express no opinion on the propriety of any of the terms which might be contained in such a contract.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

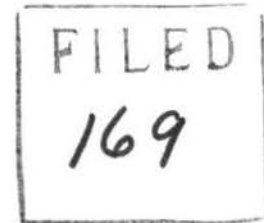
SUPREME COURT RULES:  
CITIES, TOWNS & VILLAGES:  
CONCEALED WEAPONS:  
FIREARMS:  
POLICE:  
BONDS:

A professional criminal bondsman has no authority to carry concealed weapons. Further, under Supreme Court Rule 32.14, a peace officer cannot be accepted as a surety on any bail bond. An individual cannot be appointed as a peace officer for the purpose of carrying a concealed weapon.

OPINION NO. 169

June 11, 1973

Honorable Zane White  
Prosecuting Attorney  
Phelps County, Courthouse  
Rolla, Missouri 65401



Dear Mr. White:

This official opinion is written in response to your request for same in which you addressed the following questions to the Office of the Attorney General:

"Is a professional criminal bondsman who is a special policeman in a city of the 4th Class exempt from the provisions of Section 564.610 as a person whose bona fide duty is to make arrests, or aid in conserving of the peace?

"Is a professional criminal bondsman who is not a peace officer of any kind exempt from the provision."

Section 564.610, RSMo 1969, provides that:

"If any person shall carry concealed upon or about his person a dangerous or deadly weapon of any kind or description, or shall go into any church or place where people have assembled for religious worship, or into any school room or place where people are assembled for educational, political, literary or social purposes, or to any election precinct on any election day, or into any courtroom during the sitting of court, or into any

other public assemblage of persons met for any lawful purpose other than for militia drill, or meetings called under militia law of this state, having upon or about his person, concealed or exposed, any kind of firearms, bowie knife, springback knife, razor, metal knucks, billy, sword cane, dirk, dagger, slungshot or other similar deadly weapons or shall, in the presence of one or more persons, exhibit any such weapons in a rude, angry or threatening manner, or shall have any such weapon in his possession when intoxicated, or, directly or indirectly, sell or deliver, loan or barter to any minor any such weapon, without the consent of the parent or guardian of such minor, he shall, upon conviction, be punished by imprisonment by the department of corrections for not more than five years, or by imprisonment in the county jail not less than fifty days nor more than one year, but nothing contained in this section shall apply to legally qualified sheriffs, police officers and other persons whose bona fide duty is to execute process, civil or criminal, make arrests, or aid in conserving the public peace, nor to persons traveling in a continuous journey peaceably through this state." (Emphasis added)

We shall take up your inquiries in reverse order. We find nothing in the law relating to bail and bail bondsmen which would make it the "bona fide duty" of a criminal bondsmen to "execute process, civil or criminal, make arrests, or aid in conserving the public peace. . . ." Section 544.610, RSMo, provides that a bailor may discharge his liability under a bond or recognizance by surrendering his principal in open court or to the sheriff, together with a certified copy of the recognizance (Section 544.620), and by paying all costs pertaining to a forfeiture if done prior to any final judgment on said forfeiture. A bondsmen has no bona fide duty to do so, however, but may do so to escape liability on the bond. We find nothing in the statutes of the State of Missouri which would confer any duty upon a criminal bail bondsman, including any duty to make arrests or conserve the public peace, such as would invoke the exemption of Section 564.610, RSMo, and therefore, we must conclude that the fact of being a bail bondsman does not exempt an individual from the statutory prohibition against carrying concealed weapons. Please note that Section 564.610 does not prohibit any citizen from carrying unconcealed weapons except in certain circumstances.

Honorable Zane White

Your other inquiry relating to Section 564.610, RSMo, asks whether a criminal bail bondsman who is also a special policeman in a fourth class city may legally carry a weapon concealed upon his person. We find it unnecessary to respond to this question in an affirmative or negative manner because we have concluded that a criminal bail bondsman cannot be, at the same time, a police officer in a fourth class city. Supreme Court Rule 32.14, V.A.M.R., which sets forth the qualifications of bail bond sureties in the State of Missouri, expressly precludes a surety on a bail bond from being "a peace officer" or from being an "appointed official . . . of Missouri or any county or other political subdivision thereof." Therefore, we must conclude that an individual cannot serve as a criminal bail bondsman while at the same time having an appointment as a policeman in a city of the fourth class.

Further, appointment as a police officer cannot be used as a subterfuge to authorize one without police duties to carry a concealed weapon. State v. Jamerson, 252 S.W. 682, 686 (Mo. 1923).

#### CONCLUSION

It is the opinion of this office that a professional criminal bondsman has no authority to carry concealed weapons. Further, under Supreme Court Rule 32.14, a peace officer cannot be accepted as a surety on any bail bond. An individual cannot be appointed as a peace officer for the purpose of carrying a concealed weapon.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Michael L. Boicourt.

Very truly yours,



JOHN C. DANFORTH  
Attorney General

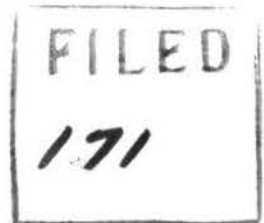
CRIMINAL LAW:  
SUNDAY SALES:

A not-for-profit civic club which operates a gift shop manned by unpaid volunteer workers selling goods, wares, and merchandise prohibited from sale on Sunday under Section 563.721, RSMo, is not exempt from the provisions of this statute even though the profits are contributed to charity.

OPINION NO. 171

June 4, 1973

Honorable David Q. Reed  
Representative, District 29  
Room 103B, Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Reed:

This is in response to your request for an opinion from this office as follows:

"Is it legal for a not-for-profit civic club to operate a gift shop which is manned by unpaid volunteers on Sunday if all of the profits of the gift shop are contributed to charity? (Whether or not they occur on Sunday).

"Not for profit civic club operates a gift shop selling merchandise to general public. Shop is exclusively staffed by unpaid volunteers.

"All profits of shop are given to charity.

"Club desires to operate shop on Sunday."

We assume the goods, wares, and merchandise offered for sale are prohibited from being sold on Sunday under Section 563.721, RSMo, and your question is whether a not-for-profit civic club operated by volunteer workers is exempt under the provisions of said statute when all the profits are given to charity.

Section 563.721, RSMo, provides as follows:

"1. Whoever engages on Sunday in the business of selling or sells or offers for sale on such day, at retail, motor vehicles; clothing and wearing apparel; clothing accessories; furniture; housewares; home, business or office

Honorable David Q. Reed

furnishings; household, business or office appliances; hardware; tools; paints; building and lumber supply materials; jewelry; silverware; watches; clocks; luggage; musical instruments and recordings or toys; excluding novelties and souvenirs; is guilty of a misdemeanor and shall upon conviction for the first offense be sentenced to pay a fine of not exceeding one hundred dollars, and for the second or any subsequent offense be sentenced to pay a fine of not exceeding two hundred dollars or undergo confinement not exceeding thirty days in the county jail in default thereof.

"2. Each separate sale or offer to sell shall constitute a separate offense.

"3. Information charging violations of this section shall be brought within five days after the commission of the alleged offense and not thereafter.

"4. The operation of any place of business where any goods, wares or merchandise are sold or exposed for sale in violation of this section is hereby declared to be a public and common nuisance."

We are unable to find any provision of law which exempts a not-for-profit civic club, or those persons volunteering their services to such a club, from the provisions of the above statute even though the profits derived from the operation are given to charity.

#### CONCLUSION

It is the opinion of this office that a not-for-profit civic club which operates a gift shop manned by unpaid volunteer workers selling goods, wares, and merchandise prohibited from sale on Sunday under Section 563.721, RSMo, is not exempt from the provisions of this statute even though the profits are contributed to charity.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

PRINTING:  
GENERAL ASSEMBLY:  
PURCHASING AGENT:  
DEPARTMENT OF REVENUE:

The printing of all stationery, bills, journals, and other printing of the legislature or any of its creatures such as legislative joint committees, interim committees or commissions must be purchased by the commissioner of administration pursuant to the provisions of Sections 34.170 through 34.250, RSMo.

OPINION NO. 172

May 11, 1973

Honorable Ray S. James  
Representative, District 31  
Room 202H, Capitol Building  
Jefferson City, Missouri 65101



Dear Representative James:

This is in reply to your request for an official opinion of this office concerning the question whether printing of all stationery, bills, journals, and other printing of the legislature or any of its creatures such as legislative joint committees, interim committees or commissions must be purchased through the state purchasing agent.

First, we note that now wherever the purchasing agent is referred to it shall mean the commissioner of administration. Section 26.300, RSMo Supp. 1971.

Section 34.170, RSMo, provides:

"The state purchasing agent shall purchase all public printing and binding of the state, including that of all executive and administrative departments, bureaus, commissions, institutions and agencies, the general assembly and the supreme court. All state officers shall order all of their printing and binding through the state purchasing agent. The purchasing agent may authorize any state penal, eleemosynary or educational institution to procure all or any part of its own printing and binding."  
(Emphasis supplied)

Section 34.180, RSMo, provides that the commissioner of administration shall advise the officials and heads of departments for economy purposes as to preparation of manuscript or copy, and shall determine, when not otherwise provided by law, for the form,



Honorable Ray S. James

style, size, etc., of all public printing, "except that (1) the form of legislative printing may be prescribed by the general assembly."

Thus, these provisions of law explicitly provide that all printing of the legislature must be purchased under the provisions of Sections 34.170 through 34.250, RSMo.

However, you advise that some members of the legislature take the position that such provisions do not apply to printing of the legislature in that Section 21.230, RSMo, controls. Section 21.230 provides:

"Each house shall control its own contingent expenses; and when any accounts properly chargeable to the house of representatives are adjusted and allowed according to the rules of that house a certificate shall be granted, signed by the speaker and attested by the chief clerk; and when any account or demand for contingent expenses of the senate is allowed according to the rules of that house a certificate shall be granted, signed by the president and attested by the secretary."

First, it is noted that unlike Section 34.170, this provision does not specifically refer to printing, but used the term "contingent expenses" which is not defined.

Assuming the costs of printing constitute a contingent expense, the question then is whether these two statutes are in conflict, and if so, which one controls.

The basic rule of statutory construction is to seek legislative intention, which should be ascertained from words used, if that is possible, and, in so doing, words should be given their plain and ordinary meaning so as to promote the object and manifest purpose of statute. State ex rel. State Highway Commission v. Wiggins, 454 S.W.2d 899 (Mo. banc 1970). If two provisions can be construed with a view of accrediting to the legislature a laudable purpose in enacting both provisions and give to both provisions life and operative effect, the court should do so. Teasdale v. Mayne, 166 S.W.2d 316 (St.L.Ct.App. 1942).

It is our opinion that when Sections 21.230 and 34.170 are read together, considering the object and manifest purposes of both sections, that they are not in conflict and both can be given effect. The fact that the commissioner of administration makes purchases of printing for the legislature does not conflict with the general legislative control of its own contingent expenses.

Honorable Ray S. James

However, if it should be considered that the two statutes are in conflict, there are two rules of statutory construction that apply. The first is that in case of conflict between general and special provisions, the special one prevails. McGrew v. Missouri Pac. Ry. Co., 132 S.W. 1076 (Mo. banc 1910). The legislature could not have been more specific than the language in Section 34.170, whereas Section 21.230 is certainly general in nature. Accordingly, under this rule it is also our opinion that Section 34.170 is controlling.

The second rule of statutory construction that applies when statutes are in conflict is that the one last enacted controls. State ex rel. Greene County v. Gideon, 199 S.W. 948 (Mo. 1947). Section 34.170 was first enacted in 1945 and has only had a minor amendment since then. L. 1945, p. 1453 §76. Section 21.230 was first enacted in 1825 and also has only had minor amendments since then. R.S. 1825, p. 506 §8, reading as follows:

"That each house shall have power to control and regulate its own contingent expenses; and when any account, properly chargeable to the house of representatives, shall be adjusted and allowed according to the rules of that house, a certificate thereof shall be granted, signed by the speaker, and attested by the chief clerk; and when any account or demand for contingent expenses of the senate, shall be adjusted and allowed according to the rules of that house, a certificate thereof shall be granted, signed by the president, and attested by the secretary; and all joint expenses of both houses, shall be regulated and controlled by their concurrent vote, and shall be ascertained and adjusted according to their joint rules, a certificate thereof shall be issued, signed by the president and countersigned by the secretary of the senate: and every such certificate, to be issued as aforesaid, shall specify the amount due, on what account, and the fund out of which it is to be paid; and the auditor of public accounts, on the delivery of such certificate to him, shall draw his warrant therefor accordingly, as in case of other demands against the state."

Thus, under this rule also, Section 34.170 controls.

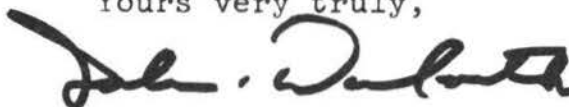
Honorable Ray S. James

CONCLUSION

It is the opinion of this office that the printing of all stationery, bills, journals, and other printing of the legislature or any of its creatures such as legislative joint committees, interim committees or commissions must be purchased by the commissioner of administration pursuant to the provisions of Sections 34.170 through 34.250, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

June 18, 1973

OPINION LETTER NO. 173

Ms. Margie Butler, Executive Secretary  
Missouri State Board of Cosmetology  
201 Bolivar Street  
Jefferson City, Missouri 65101

Dear Ms. Butler:

This letter opinion is issued in response to your request for a ruling on whether the State Board of Cosmetology may, at the request of an individual school, state on a student's license the school's actual curriculum hours and duration, even if this curriculum exceeds the state minimum qualifications to be a licensed cosmetologist.

As facts you enclose a blank copy of the license which is used by the Board. This license reads as follows:

"This is to certify that [name] is registered under the laws of Missouri as a student of cosmetology, hairdressing and manicuring in [name of school] located at [address] only under the supervision of a licensed instructor, during such period of instruction which is no less than [hours] hours, over a period of no less than [months], plus make-up time for being absent."

Some schools have a curriculum of longer than the statutory minimum of 1220 hours over a period of six months. A few schools have requested that you fill in the blanks with the number of hours

Ms. Margie Butler

of their curriculum such as "1500 hours over nine months." Presently, the Board is following the practice of inserting in the blanks for hours and duration "1220 hours over a period of six months" which is the statutory minimum.

Section 329.070, RSMo 1969, provides that all apprentices and students shall be registered with the Missouri Board of Cosmetology.

Section 329.050, RSMo 1969, provides that an applicant for examination to be a licensed cosmetologist either shall have served and completed a period of time as an apprentice or shall have been a student in a registered school for at least 1220 hours of training.

Section 329.040, RSMo 1969, provides that the cosmetology course given by a registered school be at least 1220 hours over a period of six months.

In Opinion No. 223 issued June 1, 1967, to the then Executive Secretary of the Board of Cosmetology (copy enclosed), this office held that a registered cosmetology school could not require its students to pass a final examination before releasing the students' hours and allowing the students to take their state board examination since the qualifications are set by statute. However, a cosmetology school, clearly, is not prohibited from having a curriculum of longer than the statutory minimum.

In Opinion No. 332 issued September 1, 1967 (copy enclosed) to the then Executive Secretary of the Board, this office held that the Board cannot waive the requirement that an individual be at least seventeen years of age before enrolling in a cosmetology course.

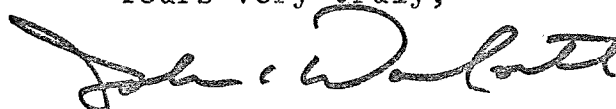
Following the rationale of those opinions, it is clear that the State Board of Cosmetology does not have the authority to change or to increase the statutory educational qualifications required to become a licensed cosmetologist in this state. The "1220 hours over a period of six months" are statutory qualifications which may not be changed by an administrative agency. Should a school decide to establish a longer curriculum than what is required by statute, it may do so. However, it must be a personal decision between a student and a school to take a longer course curriculum. This decision can in no way affect the statutory qualifications set to be a licensed cosmetologist.

Should the State Board comply with the school's request and insert in their students' licenses that their course must be the school's required number of hours and the duration of the course, this would be in effect changing the statutory qualifications for

Ms. Margie Butler

these particular students. Also, this practice would be misinforming the student as to the state requirements for the license, and thus, the students would be the victim of a fraud. The Board of Cosmetology was created and established by the Missouri legislature to license cosmetologists who meet the statutory qualifications. The Board cannot adopt a practice to change these statutory qualifications and misinform their students.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 223  
6-1-67, Casey

Op. No. 332  
9-1-67, Casey

COUNTIES: A county of the first class having  
COUNTY PURCHASES: a charter form of government may  
CONSTITUTIONAL CHARTER COUNTIES: not adopt an ordinance which pur-  
ports to establish a minimum mone-  
tary requirement for advertising for bids for supplies, equipment,  
materials or services greater than that established by Section 50.  
660, RSMo 1969.

OPINION NO. 176

December 21, 1973

Honorable Donald L. Manford  
State Senator, District 8  
Room 425, Capitol Building  
Jefferson City, Missouri 65101



Dear Senator Manford:

This opinion is in response to your question asking whether counties of the first class having a charter form of government may set the requirement for advertising for public bids at an amount greater than that required by statute. You have advised that a county ordinance of Jackson County provides that advertising for bids for supplies and contractual services shall not be required when the estimated cost shall not exceed \$2,000.

Article VI, Section 18(b) provides:

"The charter shall provide for its amendment, for the form of the county government, the number, kinds, manner of selection, terms of office and salaries of the county officers, and for the exercise of all powers and duties of counties and county officers prescribed by the Constitution and laws of the state."  
(Emphasis added)

Section 50.660, RSMo 1969, provides:

"All contracts shall be executed in the name of the county by the head of the department or officer concerned, except contracts for the purchase of supplies, materials, equipment or services other than personal made by the officer in charge of purchasing in any county having the officer. No contract or order imposing any financial obligation



Honorable Donald L. Manford

on the county is binding on the county unless it is in writing and unless there is a balance otherwise unencumbered to the credit of the appropriation to which it is to be charged and a cash balance otherwise unencumbered in the treasury to the credit of the fund from which payment is to be made, each sufficient to meet the obligation incurred and unless the contract or order bears the certification of the accounting officer so stating; except that in case of any contract for public works or buildings to be paid for from bond funds or from taxes levied for the purpose it is sufficient for the accounting officer to certify that the bonds or taxes have been authorized by vote of the people and that there is a sufficient unencumbered amount of the bonds yet to be sold or of the taxes levied and yet to be collected to meet the obligation in case there is not a sufficient unencumbered cash balance in the treasury. All contracts and purchases shall be let to the lowest and best bidder after due opportunity for competition, including advertising the proposed letting in a newspaper in the county with a circulation of at least five hundred copies per issue, if there is one, except that the advertising is not required in case of contracts or purchases involving an expenditure of less than five hundred dollars, in which case notice shall be posted on the bulletin board in the courthouse. It is not necessary to obtain bids on any purchase in the amount of one hundred dollars or less made from any one person, firm or corporation during any period of thirty days. All bids for any contract or purchase may be rejected and new bids advertised for. Contracts which provide that the person contracting with the county shall, during the term of the contract, furnish to the county at the price therein specified the supplies, materials, equipment or services other than personal therein described, in the quantities required, and from time to time as ordered by the officer in charge of purchasing during the term of the contract, need not bear the certification of the accounting officer, as herein provided; but all orders for supplies, materials, equipment or services

Honorable Donald L. Manford

other than personal shall bear the certification. In case of such contract, no financial obligation accrues against the county until the supplies, materials, equipment or services other than personal are so ordered and the certificate furnished."

It is settled that a charter county remains a legal subdivision of the state and as such is charged with the performance of state functions as are other counties, notwithstanding its charter. Casper v. Hetlage, 359 S.W.2d 781 (Mo. 1962); State ex inf. Dalton ex rel. Shepley v. Gambel, 280 S.W.2d 656 (Mo. banc 1955). The primary function of the charter is to vest the management of county business in county agencies as provided by the charter or ordinance rather than in a county court. Casper v. Hetlage, *supra*; State ex rel. Kowats v. Arnold, 204 S.W.2d 254, 256 (Mo. banc 1947); Bradford v. Phelps County, 210 S.W.2d 996, 999 (Mo. 1948); Article VI, Section 18(a), Constitution of Missouri (1945). However, a charter county may enact its own legislation governing matters which are primarily of local concern. State ex inf. Anderson ex rel. Weinstein v. St. Louis County, 421 S.W.2d 249, 254 (Mo. banc 1967); State ex rel. O'Brien v. Roos, 397 S.W.2d 578, 582 (Mo. 1965).

The central issue posed by your question is whether the purchase of supplies and services by a charter county is a matter primarily of local concern or a state governmental function.

In Hellman v. St. Louis County, 302 S.W.2d 911, 917 (Mo. 1957), the Supreme Court assumed without discussion that Section 50.660 was applicable to charter counties. Additionally, a companion statute, Section 50.640, RSMo 1969, has been construed to be applicable to St. Louis County, a charter county, with respect to the determination of the budget and number of employees of the circuit court and circuit clerk. State ex inf. Anderson ex rel. Weinstein v. St. Louis County, *supra*. The court determined that the policy of the state required that the circuit court be permitted to determine the number of personnel reasonably necessary to carry on the functions of the court.

Chapter 12, RSMo 1969, the voting machine law, was held applicable to St. Louis County, a charter county, despite a conflicting charter provision authorizing the county council to designate the type and number of voting machines to be purchased and used. State ex rel. Cole v. Matthews, 274 S.W.2d 286 (Mo. banc 1954). The conduct of elections was determined to be a state function in scope and this governmental function extended to the designation of the type and number of voting machines.

Honorable Donald L. Manford

This office has previously determined that a prosecuting attorney of a constitutional charter county may be required by statute to devote his full time and energy to his duties. See Opinion No. 234, issued March 29, 1966, to Maurice Schechter.

We have concluded that expenditures of public funds for supplies and services is a matter of statewide concern. Any construction which would permit a charter county to buy supplies, equipment, materials or services in an amount contrary to the provisions of Section 50.660 without the necessity of advertising for bids would be plainly contrary to the legislative intent. Accordingly, the ordinance enacted by the county legislature of Jackson County which purports to establish the minimum bid requirement for supplies and services conflicts with the county budget law, Section 50.660, RSMo 1969, and may not be permitted to stand.

#### CONCLUSION

It is the opinion of this office that a county of the first class having a charter form of government may not adopt an ordinance which purports to establish a minimum monetary requirement for advertising for bids for supplies, equipment, materials or services greater than that established by Section 50.660, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donald R. Bird.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

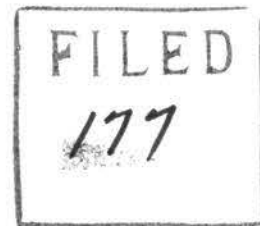
Enclosure: Op. No. 234  
3-29-66, Schechter

May 7, 1973

OPINION LETTER NO. 177  
Answer by Letter - Klaffenbach

Honorable William B. Waters  
Missouri Senate, District 17  
426 Capitol Building  
Jefferson City, Missouri 65101

Honorable Stan Thomas  
State Representative, District 18  
313 Capitol Building  
Jefferson City, Missouri 65101



Gentlemen:

This letter is in answer to your opinion request asking whether an eight mile road district organized under the provisions of Sections 233.010, RSMo et seq., is automatically dissolved when a county becomes a first class county.

Your question arises because of the provisions of Section 233.010, which states:

"Territory not exceeding eight miles square, wherein is located any city, town or village containing less than one hundred thousand inhabitants, may be organized as herein set forth into a special road district; provided, however, the provisions of this section shall not apply to counties under township organization or to class one counties"

In our Opinion No. 18, dated October 13, 1947, to Collier, copy enclosed, we held that such road districts were not automatically dissolved when a county votes in township organization. We believe the reasoning contained in that opinion is applicable in the premises and that an eight mile road district is not automatically dissolved when a county becomes a first class county.

Honorable William B. Waters  
Honorable Stan Thomas

We wish to caution you however that an opinion of this office does not have the force of law. Considering the complexities involved in reaching such a conclusion in the absence of a statutory provision or decision of an appellate court of this state directly in point and the likelihood that litigation as to tax levies by such districts and distribution of road and bridge taxes to such districts will be instituted, it would be wise to introduce legislation which will clearly resolve the issues presented.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 18  
10/13/47, Collier

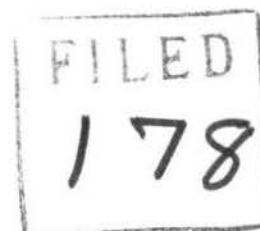
SCHOOLS:

A grading system must bear a rational relationship to a legitimate educational goal and must be reasonably administered. A teacher may take a student's tardiness into account in determining the student's grade when the tardiness affects the student's performance in the class. However, this office will not decide whether any particular grade was improperly lowered due to the consideration of possibly irrelevant factors, since this is not the sort of question appropriate for resolution by the Attorney General, and it is a decision which has been entrusted by Missouri law to local school officials.

OPINION NO. 178

August 23, 1973

Honorable Morris G. Westfall  
Representative, District 133  
Rural Route 2  
Halfway, Missouri 65663



Dear Representative Westfall:

This official opinion is in response to your request for a ruling on the following question:

"Does a school teacher have the authority to lower a student's grade as punishment for a student being tardy to class?"

Section 171.011, RSMo 1969, grants the power to regulate grading policy to the local school boards in the following language:

"The school board of each school district in the state may make all needful rules and regulations for the organization, grading and government in the school district. The rules shall take effect when a copy of the rules, duly signed by order of the board, is deposited with the district clerk. The district clerk shall transmit forthwith a copy of the rules to the teachers employed in the schools. The rules may be amended or repealed in like manner."

In Opinion Letter No. 74 issued March 20, 1973, to Cloy E. Whitney (copy enclosed), we concluded that Section 171.011 was constitutional and that a grading system satisfied due process requirements if it bears a rational relationship to a legitimate educational goal of the school district and if it is reasonably administered.



Honorable Morris G. Westfall

We believe that a teacher could reasonably conclude in appropriate circumstances that tardiness has affected a student's academic performance. For instance, the grades in a foreign language or laboratory class could be based on class participation, and a student who is chronically late or absent would have done less class work than others in the course. Similar examples come to mind with regard to many other classes as well. When tardiness affects the quality of a student's work, it may be taken into account in grading. However, it would probably be unreasonable for a student's grade to be lowered for tardiness where tardiness has no effect on a legitimate educational goal being furthered by the grading system.

As a general matter, the decision to give a particular grade is a complex one based on many facets of the student's performance and without the full facts--from both the teacher's and student's viewpoint--we believe that anyone who attempts to second-guess the giving of a grade should act with caution. Furthermore, in preparing Attorney General's opinions, this office is limited to the resolution of questions of law and ascertaining the facts in any given situation involving grading is beyond the function of this office. Questions about particular grades should be submitted to local school officials, who are entrusted with the responsibility for establishing and administering a grading system. Section 171.011, supra.

#### CONCLUSION

It is, therefore, the opinion of this office that a grading system must bear a rational relationship to a legitimate educational goal and must be reasonably administered. A teacher may take a student's tardiness into account in determining the student's grade when the tardiness affects the student's performance in the class. However, this office will not decide whether any particular grade was improperly lowered due to the consideration of possibly irrelevant factors, since this is not the sort of question appropriate for resolution by the Attorney General, and it is a decision which has been entrusted by Missouri law to local school officials.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

Enclosure: Op. Ltr. No. 74  
3-20-73, Whitney





OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

June 8, 1973

OPINION LETTER NO. 179

Honorable William Raisch  
Representative, District 107  
Room 236D, Capitol Building  
Jefferson City, Missouri 65101

Dear Representative Raisch:

This letter is in response to your opinion request on the following submitted question:

"Do the provisions of Missouri's Liquor Control Law, specifically sections 311.332, 311.334, and 311.336, RSMo, relating to regulation of liquor prices constitute illegal price fixing or illegal collusion in pricing?"

The United States Supreme Court decided in the case of Parker v. Brown, 317 U.S. 341 (1943) that certain activities of state governments were not included in the proscriptions of the federal restraint of trade laws. The decision in Parker has been illuminated upon frequently by federal courts. The general rule is that when a state acts in its sovereign capacity, as opposed to acting in a proprietary function, such activities are not proscribed by restraint of trade laws.

In a recent case discussing the Parker immunity, George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970), the First Circuit, in determining when immunity from restraint of trade laws applies, stated:

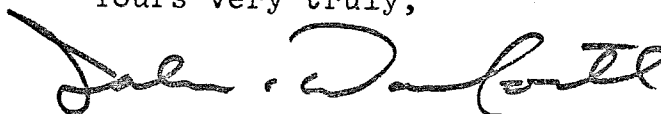
". . . Our reading of Parker convinces us that valid government action confers antitrust immunity only when government determines that competition is not the summum bonum in a particular field and deliberately attempts to provide an alternate form of public regulation."  
(424 F.2d 25, 30)

Honorable William Raisch

It is this office's opinion that the enactment by the General Assembly of the state of Missouri of Sections 311.332, 311.334, and 311.336, RSMo 1969, constitutes a determination by the state, in its sovereign capacity, that the business within the liquor industry be controlled by appropriate statutes without, in this particular instance, the proscriptions of both federal and state restraint of trade laws being made applicable thereto.

It is the opinion of this office in answer to your letter that Sections 311.332, 311.334, and 311.336, RSMo 1969, relating to the regulation of liquor prices do not constitute "illegal price fixing or illegal collusion in pricing."

Yours very truly,

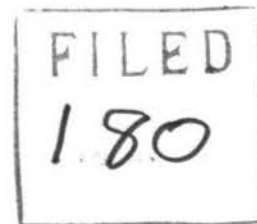
A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

May 24, 1973

OPINION LETTER NO. 180  
Answer by Letter - Klaffenbach

Honorable Donald J. Hancock  
State Representative, District 153  
301 State Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Hancock:

This letter is in response to your question asking:

"When a hospital district has been established under Chapter 206, RSMo 1969, and a fixed hospital location has been established pursuant to Section 206.070, may the Board of Directors under the authority of Section 206.110 or any other authority, change the location of such hospital."

Section 206.070, RSMo, provides:

"Each legal voter residing within the territory shall have the right to cast a ballot at the election. The ballot shall be in substantially the following form:

PROPOSITION

Shall there be organized in the Counties of . . . . ., State of Missouri, a Hospital District for the establishment and operation of a hospital to be located at . . . . . in . . . . . County, Missouri, and having the power to impose a property tax not to exceed the annual rate of fifteen cents on

Honorable Donald J. Hancock

the hundred dollars assessed valuation without voter approval, and such additional tax as may be approved hereafter by vote thereon to be known as ' . . . . . Hospital District' as prayed for by petition filed with the County Clerk of . . . . . County, Missouri, on the . . . . day of . . . , 19 . .

YES ☐  
NO ☐

(Instructions to voters: To vote in favor of the foregoing proposition, place a cross mark (X) in the square opposite the word YES. To vote against the proposition, place a cross mark (X) in the square opposite the word NO.)"

Section 206.110, RSMo, provides in part:

"1. A hospital district shall have and exercise the following governmental powers, and all other powers incidental, necessary, convenient or desirable to carry out and effectuate the express powers:

(1) To establish and maintain a hospital and hospital facilities within its corporate limits, and to construct, acquire, develop, expand, extend and improve any such hospital or hospital facility."

Thus there appears to be a conflict between the form of the ballot which is required to be in substantially the form provided in Section 206.070 and the provisions of subsection 1(1) of Section 206.110, in that the ballot form sets out the particular location of the hospital and the substantive provisions authorize the hospital district to establish a hospital within its corporate limits.

We are inclined to the view that the form of the ballot is directory and not mandatory, that its acceptance by the voters does not bind the board to any particular location within the district, and that the board has the power to locate the hospital anywhere within the district. We base this view on our belief that the substantive provisions of Section 206.110 control and on the fact that nothing in the form of the petition to

Honorable Donald J. Hancock

create the district, Section 206.020, RSMo, or in the subsequent procedure prior to calling the election, gives any indication that a site is to be fixed by the voters.

However, in order to be completely fair in our appraisal of the situation we also wish to note that we have considerable uncertainty as to how the Missouri courts would rule on the question because we find no direct precedent to guide our decision and view the applicable rules of statutory construction as somewhat conflicting as applied in the premises.

In a related but distinguishable case, State v. Wenom, 32 S.W.2d 59, 62 (1930), the Missouri Supreme Court refused to require a school board to construct a school on a site selected by the voters in an election authorizing the issuance of bonds to purchase a school building. There, however, the statute did not prescribe a form of ballot designating the site and the court held that the board's authority to locate the school building according to the board's discretion was controlling. In the premises, the ballot form, as we have noted, for some reason which we are unable to ascertain, specifies the site. In this respect it is our understanding that some of the provisions which pertain to hospital districts in our laws were taken from the Illinois statutes. This is, from our research, apparently true of the above provisions relative to the powers of the board of directors of the hospital district to select a site, although the form of the ballot in Illinois does not specify the site. Further, by comparison, the provisions of the Nursing Home District laws enacted in 1963 subsequent to the Hospital District laws enacted in 1961, contain a ballot form, Section 198.260, RSMo, which states that the nursing home will be located within the boundaries of the proposed district, and again, many of the related substantive provisions are similar to those of the Hospital District laws.

You have also indicated that on two occasions propositions have been submitted to the voters to designate the site elsewhere and that the propositions were defeated. Thus it appears that the matter is of considerable local controversy and that litigation respecting the question is probable. Our views, of course, do not have the force of law, and it is our suggestion that a court action be brought to resolve the matter.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

May 4, 1973

OPINION LETTER NO. 181

Answer by Letter - Burns

Honorable Vic Downing  
State Representative, District 162  
303 State Capitol Building  
Jefferson City, Missouri 65101

FILED

181

Dear Representative Downing:

This is in answer to your opinion request dated May 2, 1973, asking whether the student financial assistance program enacted by Senate Bill No. 613 of the Second Regular Session of the 76th General Assembly violates any of the provisions of Sections 5 or 7 of Article I, Sections 36 or 38(a) of Article III or Section 8 of Article IX of the Constitution of Missouri. In your letter transmitting such opinion request you state, "Last year you [Attorney General] explained that it would be improper to give an opinion on this law because you [Attorney General] thought that it would be challenged in court."

On August 30, 1972, Opinion Letter No. 237 was rendered to you and the fourth paragraph of such opinion letter did state that the Attorney General anticipated that the Act would probably be challenged in the courts. However, your attention is directed to the fact that the opinion letter stated, "We have examined the Act in question and we find no clear violation of the Constitution." The opinion letter also pointed out the established principle of constitutional construction, which is, a statute will be held to be unconstitutional only when there is a clear conflict between such legislative enactment and the Constitution. It is clear that Opinion Letter No. 237, 1972 specifically holds that the Attorney General finds no violation of the Constitution of Missouri in the provisions of Senate Bill No. 613 of the 76th General Assembly, Second Regular Session, providing for student financial assistance.

Honorable Vic Downing

We are enclosing a copy of Opinion Letter No. 162, rendered April 18, 1973, to Dr. Jack L. Cross, in which we reiterated our holding as to the constitutionality of Senate Bill No. 613 of the Second Regular Session of the 76th General Assembly.

We are also enclosing Opinion No. 80, rendered March 22, 1961, to J. W. Schwada, and Opinion No. 71, rendered April 3, 1951, to Elmer L. Pigg. As such opinions point out the rule is well settled in this state that a public officer has no standing or right to refuse to carry out the duties imposed upon him by a statute on the ground that he believes such statute is unconstitutional except in the case where the Attorney General of the state has advised such public official that the statute is unconstitutional. Such cases hold that it is the duty of a public official to carry out the duties imposed upon him by statute unless the statute is declared to be unconstitutional by the Attorney General or by a court of competent jurisdiction.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Enclosures: Op. Ltr. No. 162  
4/18/73, Cross

Op. No. 80  
3/22/61, Schwada

Op. No. 71  
4/3/51, Pigg





JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

May 7, 1973

OPINION LETTER NO. 182

Honorable Lawrence J. Lee  
Missouri Senate  
330 State Capitol Building  
Jefferson City, Missouri 65101

Dear Senator Lee:

This is in answer to your recent opinion request in which you propounded the following question:

"Does a statute enacted in 1927, and still in the statutes, become unenforceable when, upon adoption of the 1945 Constitution, this statute is in direct conflict with a provision of that constitution?"

You have not set forth any specific statutory provisions nor constitutional provisions. Therefore, our answer can only be one of general law.

The general rule as to the validity of statutory provisions contrary to a constitutional provision is found in the case of Curators of Central College v. Rose, 182 S.W.2d 145 (1944), where the Supreme Court of Missouri held, l.c. 148:

". . . 'If a previous law conflicts with a new constitutional provision, the law withers and decays and stands for naught, as fully as if it had been specifically repealed.' State ex rel. Goldman v. Hiller, Mo.Sup., 278 S.W. 708, 709; State ex rel. Dengel v. Hartmann, 339 Mo. 200, 96 S.W.2d 329."

However, the rule also is that if the constitutional provision is intended as a limitation only on future legislation, it

Honorable Lawrence J. Lee

does not affect a statute in effect when such constitutional provision is adopted. In the case of County of Ralls v. Douglass, 105 U.S. 728 (1881), the United States Supreme Court said, l.c. 731:

"...The Supreme Court of Missouri has many times decided, and this court, following such decisions, has always held, that the provision in the State Constitution of 1865, art. 11, sect. 14, prohibiting a county from becoming a stockholder in or loaning its credit to a corporation without a vote of the people, was intended as a limitation on future legislation only, and did not operate to repeal enabling acts in existence when the Constitution took effect. State v. Macon County Court, 41 Mo. 453; Kansas City, &c. Railroad Co. v. Alderman, 47 id. 349; State v. County Court of Sullivan County, 51 id. 522, decided in 1873, in which it was said, 'it has always been held that the provision of the Constitution, art. 11, sect. 14, was a limitation upon the future power of the legislature, and was not intended to retroact so as to have any controlling application to laws in existence when the Constitution was adopted;' State v. Greene County, 54 id. 540; County of Callaway v. Foster, 93 U.S. 567; County of Scotland v. Thomas, 94 id. 682; County of Henry v. Nicolay, 95 id. 619; County of Cass v. Gillett, 100 id. 585. . . ."

In the case of State ex rel. Harrison v. Fraizer, 11 S.W. 973 (1889), the Supreme Court of Missouri said, l.c. 973:

"...The constitutional declaration regarding the power and duty of the general assembly, in respect of the registration of voters, is, by its terms, evidently designed to have a prospective operation only. It does not purport to repeal any existing law such as is here under discussion, nor do we think any such purpose can be fairly inferred from its language, especially when we consider that, unless such an intent is evident beyond reasonable question, we should assume, as a rule of construction, that only a prospective operation of the constitution was contemplated. Shreveport v. Cole, 129 U.S. 36, 9 Sup.Ct. Rep. 210. . . ."

Honorable Lawrence J. Lee

It was held by the Supreme Court of Missouri in the case of Trustees of William Jewell College of Liberty v. Beavers, 171 S.W.2d 604 (1943), that a statute passed by the Missouri Legislature in 1851 exempting real estate held or acquired by William Jewell College from taxation became a part of the charter of such college and could not be repealed by any subsequently adopted state constitutional provisions because to do so would violate the provisions of Section 10 of Article I of the United States Constitution providing that no state shall pass any law impairing the obligation of contracts. In such case the court further held in answer to the contention that there was in existence at the time the exemption statute was passed, a general law providing that any tax exemption was revocable that the intent of the provisions in the 1865 and 1875 Constitutions providing that no property except that specifically provided for therein could be exempted from taxation was prospective only. The court said, l.c. 609, quoting from the case of State ex rel. Dosenbach v. St. Joseph's Convent of Mercy, 116 Mo. 575, 22 S.W. 811:

" . . . 'We are unable to see why the constitution of 1875 should receive, as to these sections, a different construction from that of 1865. As to prospective legislation, they are both clear and specific, but in neither do we discover any intention that they should act retrospectively. " " "

" 'It would be violative of this almost universal canon of construction to hold that these general affirmative provisions should have a retroactive effect, and that they repeal this exemption, under the general language of the constitution in the section quoted.' "

As stated above, we make no ruling as to whether any specific statute allegedly contrary to some constitutional provision is invalid but we have set forth above the general principles to be applied in making such determination.

Very truly yours,



JOHN C. DANFORTH  
Attorney General



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

December 27, 1973

OPINION LETTER NO. 183

Honorable DeVerne Calloway  
State Representative, District 81  
Room 406 State Capitol Building  
Jefferson City, Missouri 65101

Dear Mrs. Calloway:

This letter opinion is in response to your request for a ruling on the following question:

"Does a board of education have the authority to lease or otherwise acquire property outside the boundaries of the district for use by the district in carrying a regular program of instruction for elementary and secondary pupils who reside in the district?"

As set forth in your opinion request, the factual setting giving rise to your opinion is as follows:

"The board of education for the School District of the City of St. Louis has insufficient funds with which to construct new buildings or additions to existing buildings. However, due to the closing of one or more nonpublic schools, buildings are available for leasing only a short distance outside the boundary of the district. Leasing of these facilities would alleviate serious overcrowding in existing facilities."

Since your opinion request deals specifically with the school district of the City of St. Louis, our response will refer primarily to that district. The government of the school system in St. Louis, a metropolitan district under Missouri law, is entrusted

Honorable DeVerne Calloway

to a twelve member board of education, which has the power to ". . . purchase, receive, hold and sell property, and do all things necessary to accomplish the purpose for which the school district is organized." Section 162.571, RSMo 1969. The board of education is given the general powers of other school districts in the state, and specifically is authorized to "purchase and hold" property needed for public education. Section 162.621(6), RSMo 1969. These general powers include the power to select and abandon school sites and the power to rent school buildings when the school board believes that to be desirable. Crow v. Consolidated School Dist. No. 7, 36 S.W.2d 676 (Spr.Ct.App. 1931); Kemper v. Long, 212 S.W. 871 (Mo. 1919). The question asked by you is whether these powers extend to the rental of school buildings located outside the territorial confines of the district.

As a starting point, we must begin with the general rule that political subdivisions of a state can operate only within their boundaries unless expressly authorized by statute to go beyond:

"As a general rule the powers of a municipal corporation cease at municipal boundaries and cannot, without plain manifestation of legislative intention, be exercised beyond its limits, at least as far as governmental functions are concerned, even though it may have acquired property outside of its geographical limits. Within and subject to its constitutional limitations, the legislature, however, may, and often does, authorize the exercise of powers beyond municipal limits, and in accordance with the terms of the authorization, a municipal corporation may operate beyond its boundaries." 62 C.J.S., Municipal Corporations, Sec. 141, p. 283.

"It has been announced as a general rule that a municipal corporation has no power to purchase and hold land beyond its territorial limits, unless the power has been specially conferred on it by the legislature; and such power is not necessarily conferred by a general grant of power to purchase, hold, and convey such property, real and personal, as may be necessary for its public uses and purposes. The legislature, however, may confer such power, either in express terms or by necessary implication; and there are cases in which, without any special grant of such power, it has been implied as necessary

Honorable DeVerne Calloway

in order to carry out powers granted. It has been held, however, that, where a statute authorizes the purchase of lands within the corporate limits only, power to purchase land outside such limits may not be implied." 63 C.J.S., Municipal Corporations, Sec. 952, p. 502.

Accord, Taylor v. Dimmitt, 78 S.W.2d 841, 98 A.L.R. 995 (Mo. 1934).

Although these authorities speak in terms of municipal corporations, we believe that the principles expressed apply equally to school districts. A school district is a public corporation granted limited powers by the legislature, but it lacks the general governmental powers possessed by municipal corporations such as cities and counties. State ex rel. Carrollton School Dist. No. 1 v. Gordon, 133 S.W. 44 (Mo. 1910); School Dist. of Oakland v. School Dist. of Joplin, 102 S.W.2d 909 (Mo. 1937); cf. Wilson v. School Dist. of Philadelphia, 195 A. 90, 94, 95, 113 A.L.R. 1401 (Pa. 1937). Restrictions applicable generally to municipal corporations are also applicable to bodies with lesser authority such as school districts, and this would include geographical restrictions on the exercise of public functions. Therefore, the St. Louis Board of Education has no common-law power to lease property outside the district's boundaries, and before it can do so it must be able to point to specific statutory authority.

Our analysis of the statutes starts with Section 162.621, RSMo 1969, dealing with the powers of metropolitan school boards:

"The board of education shall have general and supervisory control, government and management of public schools and public school property of the district in the city and shall exercise generally all powers in the administration of the public school system therein. The board of education has all the powers of other school districts under the laws of this state except as herein provided and shall perform all duties required by general laws of school districts so far as they are applicable to the public school affairs of the city and are consistent with this law. It shall appoint the officers, agents and employees it deems necessary and proper and fix their compensation. The board of education may:

Honorable DeVerne Calloway

"(1) Make, amend and repeal rules and bylaws for its meetings and proceedings, for the government, regulation and management of public schools and school property in the city, for the transaction of its business, and the examination, qualification: and employment of teachers, which rules and bylaws are binding on the board of education and all parties dealing with it until formally repealed;

\* \* \*

(6) Purchase and hold all property, real and personal, deemed by it necessary for the purposes of public education; . . ."  
(Emphasis added)

The language of this section implies that school property of the district must be located within the city limits.

Since school districts are political subdivisions of the state and since they derive their powers from the legislature, it is clear that the legislature may give school districts the power to buy, rent, or otherwise acquire property located outside the district's boundaries. However, in the absence of any such grant of power, the St. Louis district lacks the authority to enter into the proposed school rental about which you inquire.

It is therefore our view that the board of education of a metropolitan school district does not have the authority to lease or otherwise acquire property outside the boundaries of the district for use by the district in carrying out a regular program of instruction for elementary and secondary pupils who reside in the district.

Very truly yours,



JOHN C. DANFORTH  
Attorney General



SCHOOLS:

A public school district may accept voluntary donations or contributions from individuals to help defray the costs of educational programs offered by the district. The contributor may specify the program to be aided by his donation, and the school district may bind itself to use the money for that purpose provided that in so doing it does not discriminate between students on the basis of whether they or their parents have made a donation.

OPINION NO. 184

October 15, 1973

Honorable J. Anthony Dill  
State Representative, District 102  
7723 Ravenhill Drive  
Affton, Missouri



Dear Representative Dill:

This official opinion is in response to your request for a ruling on the following questions:

- "1. May a public school district accept voluntary donations or contributions from individuals to help defray the costs of educational programs offered by the district?
- "2. If an individual makes a voluntary contribution to a public school district to help defray the costs of educational programs, may the contributor specify the object of the donation and may the public school district be bound by such a specification? (Example: If a contributor made a contribution to be used for purchase of band music or supplies, is the district obliged to use the contribution for such purposes?)"

You state that "Parents and other interested parties have expressed the desire to continue making extra payments to schools on a voluntary and non-obligatory basis to help their schools." We assume that these contributions are truly voluntary on the

Honorable J. Anthony Dill

part of the contributors and are not a substitute for illegal fees. We do not have any facts presented by the opinion request and therefore limit our holding to the right of a district generally to accept donations for specified purposes.

School districts in Missouri are expressly authorized by Section 165.011, RSMo 1969, to accept money donated to them for a specific purpose. This section, in relevant part, reads as follows:

" . . . Money donated to the school districts shall be placed to the credit of the fund where it can be expended to meet the purpose for which it was donated and accepted. Money received from any other source whatsoever shall be placed to the credit of the fund or funds designated by the board."

We believe that this section authorizes the kind of donation about which you ask. If "parents and other interested parties" want to support a particular program in the schools by making donations, the school has the power to accept these donations and earmark the funds for the specific program in question. However, a school may not require a donation as a precondition for enrollment in any course, and while a donation may be designated for the support of a specific program, it may not be designated for the use of a specific student. A school district may not discriminate in the use of public funds between students equally eligible and qualified for participation in a school function based on whether one of the students (or his parents) has donated money for the support of that function. See Opinion No. 6, Gordon, 5-2-73.

It should be noted that these conclusions apply only to donations made to the school itself. We do not wish to suggest that a student may not use his own property while participating in a school function.

#### CONCLUSION

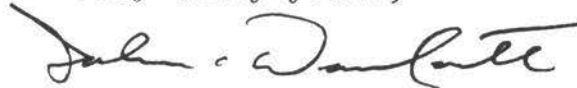
It is, therefore, the opinion of this office that a public school district may accept voluntary donations or contributions from individuals to help defray the costs of educational programs offered by the district. The contributor may specify the program to be aided by his donation, and the school district may bind itself to use the money for that purpose provided that in so doing

Honorable J. Anthony Dill

it does not discriminate between students on the basis of whether they or their parents have made a donation.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 6  
5-2-73, Gordon

GOVERNOR:  
DIVISION OF WELFARE:  
PUBLIC CALAMITY:  
CONSTITUTIONAL LAW:

The Governor of the state of Missouri has authority under the provisions of Chapter 44, RSMo, to declare that an emergency exists because of a natural disaster of major proportions and to expend appropriations available for providing relief pursuant to a state plan for the benefit of persons affected by the disaster.

OPINION NO. 185

May 15, 1973

Honorable William C. Phelps  
Lieutenant Governor of Missouri  
327 State Capitol Building  
Jefferson City, Missouri 65101



Dear Lieutenant Governor Phelps:

This opinion is in response to your question asking whether the state of Missouri has authority to lease and install improvements such as utilities upon land sites for the purpose of locating mobile homes that will be occupied by persons who have been dislodged from their homes by the flooding which has recently occurred in counties declared by the President to be eligible for disaster aid.

You state that:

"Overall in the State of Missouri, approximately 800 families have been dislocated from their permanent homes and will need mobile homes for purposes of temporary housing because adequate housing is not available in the vicinity. Federal law permits the Department of Housing and Urban Development to rent the mobile homes or provide the homes if state and local governments provide the land site with properly installed utilities."

Section 38(a) of Article III of the Missouri Constitution excepts from the prohibitions imposed on the General Assembly respecting grants and gifts to individuals "aid in public calamity." Thus the General Assembly unquestionably has the authority to provide aid in public calamity.

In implementation of such constitutional authority, the General Assembly provided in Section 207.010, RSMo, that:

Honorable William C. Phelps

"1. The division of welfare is an integral part of the department of public health and welfare and shall have and exercise all the powers and duties necessary to carry out fully and effectively the purposes assigned to it by law and shall be the state agency to [administer state plans and laws involving]

\* \* \*

(3) Aid or relief in cases of public calamity;  
..."

Further, Section 208.060, RSMo, provides in part:

"Application for any benefits under any law of this state administered by the division of welfare acting as a state agency shall be filed in the county office. Application for aid to dependent children shall be made by the person with whom the child will live while receiving aid. All applications shall be in writing, or reduced to writing upon blank forms furnished by the division of welfare, and shall contain such information as may be required by the division of welfare or by any federal authorities under the social security law and amendments thereto. The term 'benefits' as used herein or in this law shall be construed to mean:

\* \* \*

(3) Aid or public relief to individuals in cases of public calamity; ..."

We conclude from the above that the Division of Welfare has the authority to administer relief programs.

Section 208.170, RSMo, which contains provisions for such relief funds provides in part:

"1. The state treasurer shall be treasurer and custodian of all funds and moneys of the division of welfare and shall issue checks upon such fund or funds in accordance with such rules and regulations as the division of welfare shall prescribe.

Honorable William C. Phelps

"2. There is hereby established as a special fund, separate and apart from the public moneys of this state, the following:

\* \* \*

(3) Relief fund;

\* \* \*

"5. The relief fund shall consist of moneys appropriated by the state, and such moneys as may be received from the federal government or other sources for aid or relief in cases of public calamity. All expenditures for aid or relief in cases of public calamity shall be paid from this fund."

However, only persons who come within the eligibility requirements of Section 208.010, RSMo, can receive assistance under Chapter 208. In the premises, it appears that many of the victims of such a disaster will not meet the strict eligibility requirements which govern assistance administered by the Division of Welfare. Therefore, many of the persons inquired about in your opinion request could not be assisted by the Division of Welfare out of appropriations to the Division for aid in a public calamity.

You have also informed us that the Governor has declared an "emergency" to exist within the meaning of the term as defined in Section 44.010(4), RSMo. Section 44.100, RSMo, which authorizes the Governor to declare an emergency provides in part:

"1. The emergency powers of the governor shall be as follows:

(1) The provisions of this section shall be operative only during the existence of a state of emergency (referred to in this section as 'emergency'). The existence of an emergency may be proclaimed by the governor or by resolution of the legislature, if the governor in his proclamation, or the legislature in its resolution, finds that an attack upon the United States has occurred, or that a natural disaster of major proportions has actually occurred within this state, and that the safety and welfare of the inhabitants of this state require an invocation of the provisions of this section.

\* \* \*

Honorable William C. Phelps

(4) During the period that the state of emergency exists or continues, the governor shall:

(a) Enforce and put into operation all plans, rules and regulations relating to disasters and emergency management of resources adopted under this law and to assume direct operational control of all emergency forces and volunteers in the state;

(b) Take action and give directions to state and local law enforcement officers and agencies as may be reasonable and necessary for the purpose of securing compliance with the provisions of this law and with the orders, rules and regulations made pursuant thereof;

\* \* \*

(j) To perform and exercise such other functions, powers and duties as may be necessary to promote and secure the safety and protection of the civilian population."

Section 44.120, RSMo, provides:

"All expenses, salaries and other payments authorized by this law, and chargeable to the state, including any payments required by any compacts or agreements made hereunder, shall be paid out of the general revenues from the state treasury."

Further, Section 44.130, with respect to plans and regulations, provides:

"1. Every plan, rule and regulation adopted by the governor under the provisions of this law and every amendment thereof shall be filed in the office of the secretary of state.

"2. Any person violating any rule or regulation adopted under this law after it has become effective during an emergency or any person or officer violating any provision of this law shall be deemed guilty of a misdemeanor."



Honorable William C. Phelps

Thus, it is obvious that once the Governor has declared an emergency within the meaning of Chapter 44, RSMo, he is legally vested with broad powers respecting the public welfare. The Governor may thus proceed with a plan adopted or may make or amend such plan to meet the exigencies of the situation. Further, under Section 44.110, RSMo, in carrying out the emergency powers under this law the Governor and the executive officers of the state are authorized and ". . . directed to utilize the services, equipment, supplies and facilities of existing departments, offices, and agencies of the state and political subdivisions thereof to the maximum extent practicable, . . ."

We conclude that the Governor has the power to use state appropriations for disaster purposes to provide emergency housing in such a case and may utilize such state agencies as he desires to carry out the objectives of the plan and in conformity with the plan.

In the premises, however, we are of the view that it is not the function of this office to determine the nature or extent of the relief that can or should be granted.

#### CONCLUSION

It is the opinion of this office that the Governor of the state of Missouri has authority under the provisions of Chapter 44, RSMo, to declare that an emergency exists because of a natural disaster of major proportions and to expend appropriations available for providing relief pursuant to a state plan for the benefit of persons affected by the disaster.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

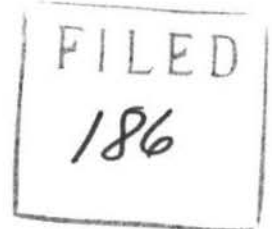
UNIVERSITIES:  
APPROPRIATIONS:

The General Assembly may authorize the expenditure of state funds for capital improvement purposes on the campuses of Missouri Western State College and Missouri Southern State College.

OPINION NO. 186

May 17, 1973

Honorable James Russell  
Representative, District 58  
Room 306, Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Russell:

This is in response to your request for an opinion from this office as follows:

"May the General Assembly authorize the expenditure of funds of the state for capital improvement purposes on the campuses of Missouri Western University and Missouri Southern University?

"A request was made in House Bill #9 of the 77th General Assembly, First Regular Session, for funds of the state for capital improvement purposes. The buildings and facilities at these two universities belong to the junior college districts and not to the state. Before appropriating money to the universities for the prescribed purposes, it is necessary to determine whether the General Assembly can legally do so."

We assume the Missouri Western University, to which you refer, is Missouri Western State College established under Section 174.250, RSMo, in St. Joseph, Missouri, and Missouri Southern University, to which you refer, is Missouri Southern State College established under Section 174.230, RSMo, in Jasper County, Missouri.

Section 174.260, RSMo, provides for the appointment of a board of regents consisting of five members appointed by the Governor with the advice and consent of the Senate who are responsible for the administration of the Missouri Western State College and the Missouri Western Junior College. It further provides as follows:

Honorable James Russell

"2. The state shall provide the funds necessary to provide the staff for and operation of the state senior college. The board of trustees of the junior college district shall levy a tax within the district, as provided in sections 178.770 to 178.890, RSMo, which, together with state aid provided for junior colleges and funds available from any other sources, will be sufficient to pay the costs of the operation of the junior college and the costs of any capital improvements for both the junior and senior college." (Emphasis added)

Section 174.240, RSMo, provides for a board of regents consisting of five members appointed by the Governor with the advice and consent of the Senate who shall be responsible for the administration of the Missouri Southern State College and the Jasper County Junior College. It further provides as follows:

"2. The state shall provide the funds necessary to provide the staff for and operation of the state senior college. The board of trustees of the junior college district shall levy a tax within the district as provided in sections 178.770 to 178.890, RSMo, which, together with state aid provided for junior colleges and funds available from any other sources, will be sufficient to pay the costs of the operation of the junior college and the costs of any capital improvements for both the junior and senior college." (Emphasis added)

Under the above statutes, the state is required to provide the funds necessary to provide the staff for the operation of the state senior college. Such statutes further require the board of trustees to levy a tax within the district which, together with state aid provided for junior colleges and funds available from other sources, will be sufficient to pay the costs of the operation of the junior college and the cost of any capital improvements for both the junior and senior colleges.

Under Sections 174.260 and 174.240, the state is obligated only to provide funds for the staff for the operation of the state senior colleges. The boards of trustees of the junior college districts have the obligation of levying a tax within the districts which, together with state aid provided for junior colleges and funds available from any other sources, is sufficient to pay the costs of the operation of the junior college and the costs of any

Honorable James Russell

capital improvements of both the junior and senior colleges. It is clear from such statutes that funds may be available from other sources than the junior college district tax levy to provide for all or a part of the costs of capital improvements. If no other funds are available then the entire cost of the capital improvements must be raised by a tax levy by the boards of trustees of the junior college districts.

There are, however, no constitutional or statutory provisions prohibiting the use of state funds for capital improvements for the senior colleges. Missouri Southern College and Missouri Western College, as pointed above, are state colleges and appropriations may be made for the benefit of such colleges just as appropriations are made for the other state colleges or universities that have been in existence for many years. The state of Missouri has obligated itself only to provide funds necessary to provide the staff for an operation of state senior colleges designated Missouri Southern and Missouri Western but we find no provision prohibiting the appropriating of state money for capital improvements for Missouri Southern and Missouri Western Colleges. The question of whether or not appropriations for capital improvements for Missouri Southern or Missouri Western are to be made is one to be determined by the legislature in assessing the needs for capital improvements for such institutions after taking into consideration the total amount of state money available for appropriations and the requirements of other state institutions and offices.

#### CONCLUSION

It is the opinion of this office that the General Assembly may authorize the expenditure of state funds for capital improvement purposes on the campuses of Missouri Western State College and Missouri Southern State College.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

August 13, 1973

OPINION LETTER NO. 188

Mr. James L. Wilson  
Director of Parks  
Missouri State Park Board  
Post Office Box 176  
Jefferson City, Missouri 65101

Dear Mr. Wilson:

This is in response to your request for my legal opinion on the following question:

"Does the Missouri State Park Board have the legal authority to invest funds of the Confederate Memorial Park Endowment Fund and use the income therefrom for the maintenance of the Confederate Memorial State Park?"

In 1925, the General Assembly established the Confederate Soldiers' Home Endowment Fund to be administered by the board of trustees of such home. The fund was to be composed of gifts, donations, and bequests from private sources and was to be used for maintenance of certain described land in Lafayette County as a permanent memorial park to the valor of Confederate soldiers. The board of trustees was authorized to invest the moneys of the fund, to use the income derived from the investment for maintenance of the park grounds, and to retain the principal intact as a permanent endowment fund. L.Mo. 1925, p. 136.

The General Assembly in 1943 abolished the board of trustees and transferred the control and management of the Confederate Soldiers' Home to the Board of Managers of the State Eleemosynary Institutions. Custody of the endowment fund was likewise placed in the board of managers and it was given similar authority to invest the moneys of the fund and to use the income for maintenance of the park grounds while leaving the principal intact. L.Mo. 1943 p. 953.

Mr. James L. Wilson

The Division of Welfare succeeded to the role of the Board of Managers of the State Eleemosynary Institutions in 1949. Senate Bill No. 1067, L.Mo. 1949.

In 1951, the Confederate Soldiers' Home was abolished and all its property except the memorial park transferred to the Department of Public Health and Welfare. The control, maintenance, and administration of the Confederate Memorial Park was transferred to the State Park Board and control of the endowment fund was also transferred to the State Park Board. The park board was authorized to accept gifts, donations or bequests for the maintenance of the Confederate Memorial Park, to sell, convey or otherwise convert into money any property so received, to invest such moneys, and to use the income for maintenance of the park while preserving intact the principal. L.Mo. 1951, p. 774.

Finally, in 1957, the General Assembly again identified the grounds of the memorial park the same as they had been described in the Laws of 1925, declared such grounds a permanent memorial park to the valor of Confederate soldiers during the War Between the States, and continued the State Park Board's control, maintenance, and administration of the park and the endowment fund. The maximum amount of the fund was set at \$75,000.00 but otherwise the State Park Board's power over the fund was not changed. L.Mo. 1957, p. 306; Sections 253.110 and 253.120, RSMo.

You have advised us that as of May 16, 1973, the total assets of the Confederate Memorial State Park Permanent Endowment Fund was \$26,260.65, with the major portion thereof invested in United States Treasury Bonds. These bonds are secured by the State Park Board in a safe deposit box in the Central Trust Bank. The State Park Board maintains a small amount of the fund in a checking account with the bank for use as needed at the Confederate Memorial Park. The State Treasurer does not have any custody or control of the fund, and the General Assembly does not periodically appropriate moneys from the fund for the State Park Board's use.

We understand your question to be whether the Missouri State Park Board is the proper custodian of the Confederate Memorial Park Permanent Endowment Fund, whether the park board may manage and invest the assets of such fund, and whether the park board may use the income of such fund without appropriation thereof.

For the same reasons expressed in our Opinion Letter No. 91, May 26, 1971, to Robinson (copy enclosed), we believe the assets of the Confederate Memorial Park Permanent Endowment Fund are within the purview of Article IV, Section 15 of the Constitution and Section 30.240, RSMo, and should be handled accordingly. We

Mr. James L. Wilson

therefore believe custody of the fund should be transferred to the State Treasurer for management and investment consistent with Article IV, Section 15, and that subsequent use of the income of the fund should be as authorized by proper legislative appropriation to the State Park Board.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. Ltr. No. 91  
5-26-71, Robinson



May 24, 1973

OPINION LETTER NO. 191  
Answer by letter-Klaffenbach

Dr. Richard S. Brownlee, Chairman  
American Revolution Bicentennial  
Commission of Missouri  
Elmer Ellis Library  
Columbia, Missouri 65201



Dear Dr. Brownlee:

This letter is in answer to your question asking:

"Is the American Revolution Bicentennial Commission of Missouri authorized to employ staff personnel additional to a secretary?"

The American Revolution Bicentennial Commission of Missouri was created by House Bill No. 1559, 76th General Assembly, Second Regular Session.

Section 1 of the bill provides that the Commission is to serve without compensation although the members are to "be reimbursed for their actual and necessary expenses incurred in the performance of their duties." Subsections 4 and 5 of Section 1 provide:

"4. The commission may recommend additional persons to assist in its work and the governor may appoint such persons, and any others he deems necessary, to serve as honorary members. Honorary members shall serve without compensation and shall not be reimbursed for expenses.

"5. The commission shall employ a secretary to perform the duties designated by the commission."

Dr. Richard S. Brownlee

In addition, we note that Section 3 of the bill provides for cooperation between the Commission and state departments, agencies and various officers.

It is our view that the above provisions indicate that the legislature intended to authorize the employment of only one employee, a secretary, and that such other persons as are required to assist in the work of the Commission may be appointed by the Governor to serve without compensation and without reimbursement for expenses.

Yours very truly,

JOHN C. DANFORTH  
Attorney General



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

May 30, 1973

OPINION LETTER NO. 193

Honorable Robert Fowler  
Representative, District 69  
Room 401, Capitol Building  
Jefferson City, Missouri 65101

Dear Representative Fowler:

This letter is in response to your question in which you ask:

"Is there some way a city of the 4th class in St. Louis County can require that a policeman remain with the city for a certain period of time after the said city has paid his salary for sixteen (16) weeks of school, either in St. Louis Police Academy, or St. Louis County Police Academy?"

We presume you refer to the training requirements pursuant to Section 66.250, RSMo Supp. 1971.

Our view is that it is clear that there is no way in which officers can be forced to remain on the police force of the city in light of the Thirteenth Amendment to the United States Constitution which prohibits involuntary servitude. See Thompson v. Bunton, 22 S.W. 863 (Mo. banc 1893); 16 C.J.S. Constitutional Law §203(1).

Yours very truly,

JOHN C. DANFORTH  
Attorney General

OFFICERS: Public defender offices created  
PUBLIC DEFENDERS: under the provisions of Senate  
GENERAL ASSEMBLY: Committee Substitute for House  
Bill No. 1314, 76th General As-  
sembly, Second Regular Session, may be abolished during the terms  
of the incumbent public defenders. The incumbents have no right  
to any salary after the offices are abolished.

OPINION NO. 194

May 29, 1973

Honorable Morris G. Westfall  
Representative, District 133  
Room 236A, Capitol Building  
Jefferson City, Missouri 65101

FILED

194

Dear Representative Westfall:

This opinion is in response to your request asking:

"If legislation is passed abolishing the full time Public Defender office in one judicial district and establishing an appointed counsel program, how long will the full time Public Defender be allowed to receive the Public Defender salary?"

Public defenders are appointed under the provisions of subsection 2, section 3 of Senate Committee Substitute for House Bill No. 1314, 76th General Assembly, Second Regular Session, for a term of four years. That subsection provides:

"2. The defender shall hold office for a term of four years, beginning on the first day of January following his appointment, but if a public defender is appointed before January 1, 1973, he shall hold office until January 1, 1973, and he may then be appointed for a full four year term beginning January 1, 1973. The defender may be reappointed for additional terms of four years."

In State ex rel. Voss v. Davis, 418 S.W.2d 163 (1967), the Missouri Supreme Court held that a public officer has "... no vested nor private property right in a public office ..." or its term. In Davis the court quoted with approval this statement from Sanders v. Kansas City, 162 S.W. 663, 665 (K.C.Mo.App. 1914):

Honorable Morris G. Westfall

" . . . [A]n officer elected or appointed even for a definite term takes office with the implied understanding that the power which created the office may abolish it before the expiration of his term, in which event he will find himself out of office. . . ."

It is our view that the legislature having created the office has the power to abolish the office. When the office is abolished, the incumbent has no further right to the emoluments of the office because the office then no longer exists.

It should be clear, however, that any legislation to abolish the office during the term of an officer should address itself clearly to that purpose because the Missouri courts are reluctant in the case of any ambiguity whatsoever to hold that an office with a term, whether elective or appointive, is vacated or abolished. Cf. State ex rel. Hall v. Vaughn, 483 S.W.2d 396 (Mo. banc 1972). In addition, it is clear that such legislation cannot be specifically designed to oust an incumbent and must not fall within the category of special legislation.

#### CONCLUSION

It is the opinion of this office that public defender offices created under the provisions of Senate Committee Substitute for House Bill No. 1314, 76th General Assembly, Second Regular Session, may be abolished during the terms of the incumbent public defenders. The incumbents have no right to any salary after the offices are abolished.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

WATER SUPPLY DISTRICTS:

A public water supply district organized under Chapter 247, RSMo, cannot charge a property owner or the tenant of real property for delinquent water bills of former tenants.

OPINION NO. 196

September 4, 1973

Honorable Vernon King  
Representative, District 16  
2007 East Ridge Drive  
Excelsior Springs, Missouri



Dear Representative King:

This is in response to your request for an opinion from this office as follows:

"Can Public Water District No. 2 in Ray County charge a property owner or the tenant of real property for delinquent water bills of former tenants.

"Public Water District No. 2, Ray County, whose offices are located in Richmond, Missouri, are charging the property owner or the future tenant for any and all delinquent water bills of former tenants."

Chapter 247, RSMo, provides for the establishment of public water supply districts. Section 247.020, RSMo, provides that when the districts are formed they shall be known as public water supply districts of the counties in which the districts are located and shall be political corporations of the state of Missouri and shall be invested with all the powers conferred upon them by the provisions of this chapter. Section 247.050, RSMo, provides that they shall have the following powers provided therein including:

"The following powers are hereby conferred upon public water supply districts organized under the provisions of sections 247.010 to 247.220:

\* \* \*

Honorable Vernon King

(14) To provide for the collection of taxes and rates or charges for water and water service;

(15) To sell and distribute water to the inhabitants of the district and to consumers outside the district, delivered within or at the boundaries of the district;

(16) To fix rates for the sale of water;  
and

(17) To make general rules and regulations in relation to the management of the affairs of the district."

Section 247.110, RSMo, provides for the fixing of rates or charges for water or water service furnished by the district to be vested in a board of directors. The rates or charges to be fixed shall at all times be reasonable and the board shall take into consideration the sum or sums required to retire outstanding special obligation bonded indebtedness, the need for extension of mains, repairs, depreciation, enlargement of the plant, adequate service, obsolescence, overhead charges, operating expenses, and the need of an operating fund which the district may need in emergencies.

Section 247.120, RSMo, provides for the board of directors to make estimates of the amount of taxes required to be levied to provide for the purposes of the district as specified in this chapter.

Under these statutes, the establishing and operating expenses of the district are to be maintained by taxes as well as by service charges for the water that is used and furnished to its customers.

In your opinion request, you inquire whether the property owner or the future tenant can be charged or held liable for unpaid water bills of former tenants; and we assume you want to know whether the water district has authority to refuse water service or disconnect for nonpayment of such charges.

We are unable to find any statutory provision authorizing the property owner or the tenant to be charged for delinquent water bills of the prior property owner or prior tenant.

A municipality or a private concern supplying water to the public may prescribe and enforce a rule or regulation which provides for shutting off the water supply from a consumer who has



Honorable Vernon King

defaulted in the payment of the same. Mulrooney v. Obear, 171 Mo. 613, 71 S.W. 1019 (Mo. 1903); McDaniel v. The Springfield Waterworks Company, 48 Mo.App. 273 (St.L.Ct.App. 1892).

In 94 C.J.S. Waters §305, the general rule of law is that payment of lawful water charges by the consumer may be enforced by shutting off water when bills are overdue and refusing to furnish water until they are paid. The general rule of law, as stated therein, in regard to shutting off the water for nonpayment of bills incurred by one other than the current occupant or consumer of the premises, is stated as follows:

"A municipality or water company cannot resort to cutting off the water supply as a means of collecting bills left unpaid by a former tenant, occupant, or owner of the building, in the absence of a statute expressly authorizing it or making the arrearages a lien on the lands; or of contractual authority, although it may do so where such a statute or lien exists, but not where a lien once had has been lost. In other words, no right exists to cut off the water supply to compel payment of a bill which it is not the duty of the consumer to pay. So, a company's rule that service might be discontinued if the water rates are unpaid for a specified period makes the new owner of property liable for service rendered while the property is owned by him, but not for service rendered while the property was owned by the prior owner.

"Except where there is a statute making the charge a lien on the premises, a tenant cannot be denied water service because the landlord is in arrears, and the tenant need not, in such case, pay the arrears of the landlord as a condition to water service; nor may an owner be refused water for failure of a tenant to pay his bill where the owner has not guaranteed payment.

"Where the discontinuance of service for nonpayment of another's arrearages is authorized, the water may not be shut off unless the consumer had notice that he would be required to pay. The right to shut off the water for nonpayment of another's bills, where it exists,

Honorable Vernon King

is not waived by the failure of the city to exercise its statutory right to require a deposit for the payment of the bills."

In Vanderberg v. Kansas City Missouri Gas Company, 105 S.W. 17 (K.C.Ct.App. 1907), the plaintiff sued the Kansas City Gas Company, a private utility, for damages for shutting off the gas at the apartment rented by plaintiff's husband and where the family lived. The gas company undertook to furnish gas service but later discovered plaintiff's husband was delinquent in gas bills for gas service furnished at the place of business which her husband operated. The franchise from the city gave the gas company the right to shut off the gas for any consumer who was in arrears for more than 15 days for gas service. The gas company then shut off the gas at the apartment that was rented by plaintiff's husband. Plaintiff petitioned the gas company to furnish service to her at this apartment which they refused to do and as a result this suit was instituted. The court held that plaintiff was not the tenant of the premises and not entitled to have gas service furnished to the apartment which was rented in another person's name. In discussing the rights of a public utility to refuse service because of delinquent bills owed by other persons, the court stated, l.c. 608:

"And, further, on the hypothesis that plaintiff had come to defendant as the tenant of premises where she desired to consume gas, defendant had no right to compel her to pay the debt of another as a condition without the performance of which it would not supply her. The provision in the charter by which defendant could discontinue service to a delinquent customer is a reasonable regulation and, therefore, one which the courts will enforce. Compelling applicants to deposit a sufficient amount of cash to guarantee the payment of monthly bills likewise is a reasonable regulation. The company either would have to go out of business or else increase the rates charged to paying consumers to meet the loss of revenue from the failure of others to pay if it could not legally protect itself against such loss, by requiring cash deposits and by stopping its service to delinquents. But there is no more reason for compelling a married woman to pay her husband's debt, for the payment of which she is not legally bound, than there would be for compelling her to pay the debt of a stranger. The attempt made by

Honorable Vernon King

defendant to coerce her into paying such debt was unreasonable and her failure to submit to such coercion afforded no lawful excuse for defendant's refusal to enter into a contract with her."

The general rule as to liability of the occupant or owner of the premises for unpaid charges for utilities furnished third persons is stated in 19 A.L.R.3d 1232-1233 as follows:

"Municipalities and public utility companies have frequently sought reimbursement of unpaid charges for utilities from the property served itself, or someone connected with the property, such as an occupant or owner, other than the one who incurred the charges. The conventional rule has been that liability for the debt of another cannot be imposed in the absence of special agreement or statutory authorization for a lien on the property, and ordinances or regulations seeking to impose such liability have usually been held unreasonable in the absence of an authorized lien. In numerous cases the courts have recognized that in the absence of a lien authorized by statute or special agreement, there can be no imposition of liability, for utility charges incurred, upon one other than the user or one who contracted for the supply."

Numerous cases of the courts in other states are cited in support of this rule.

In City of Maryville v. Cushman, 249 S.W.2d 347 (Mo. banc 1952) the court held a statute, and an ordinance incorporating it, providing that the owner of premises occupied by a tenant is liable with such tenant for charges for water services, and that the city may sue the occupant or owner or both to recover any sums due for such services, without imposing a lien on the property, did not deny due process of law, the court reasoning that an owner is charged with notice of a statute and ordinance to the above effect, and that the obvious theory was that the obligation of the owner rested upon a contract implied from the fact that he connects his real estate with water facilities of the city and permits the occupant to so use the real estate.

In the above case, a decision was based on what is now Section 250.140, RSMo, which provides as follows:

Honorable Vernon King

"Sewerage services or water and sewerage services combined shall be deemed to be furnished to both the occupant and owner of the premises receiving such service and the city, town or village or sewer district rendering such services shall have power to sue the occupant or owner, or both, of such real estate in a civil action to recover any sums due for such services, plus a reasonable attorney's fee to be fixed by the court."

This section has no application to water supply districts and we find no statute giving a water supply district power to recover from the owner or future tenant for delinquent bills of former tenants.

It is our view that under the above-statutory provisions and court decisions cited herein, a public water supply district organized under Chapter 247, RSMo, cannot charge a property owner or the tenant of the property for delinquent water bills of the owner or former tenants.

#### CONCLUSION

It is the opinion of this office that a public water supply district organized under Chapter 247, RSMo, cannot charge a property owner or the tenant of real property for delinquent water bills of former tenants.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

May 29, 1973

OPINION LETTER NO. 198

Mr. B. W. Robinson  
Assistant Commissioner  
Director, Career and Adult Education  
Department of Education  
Jefferson State Office Building  
Jefferson City, Missouri 65101

Dear Mr. Robinson:

This is in answer to your request for our review of the annual revision of the State Plan for Vocational and Technical Education in Missouri, said revision being necessary under the provisions of the Vocational Education Act of 1963, Public Law 88-210, as amended in 1968 by Public Law 90-576 (20 U.S.C., Section 1241 et seq.).

It is the opinion of this office that the Missouri State Board of Education is the "state board" in this state within the meaning of Section 108(8) of Public Law 90-576. Also, we find that the Missouri State Board of Education has the authority under state law to submit a State Plan for Vocational Education and to administer or supervise the administration of same. See Sections 178.420 to 178.580, RSMo 1969. Further, we think that the provisions of this Plan can be carried out by the state; and we note that the Commissioner of Education has been duly authorized by the Missouri State Board of Education to submit the State Plan for Vocational and Technical Education in Missouri and to represent the Missouri State Board of Education in all matters pertaining thereto. See Section 178.540, RSMo 1969.

In conjunction with this letter opinion which constitutes our official certification of the application, we have completed the required certification form.

Yours very truly,

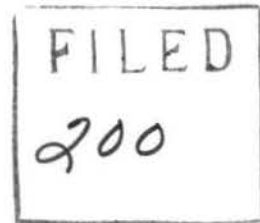
A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH  
Attorney General

May 30, 1973

OPINION LETTER NO. 200  
Answer by Letter - Klaffenbach

Mr. James S. McClellan, Chairman  
Board of Election Commissioners  
City of St. Louis  
208 South 12th Boulevard  
St. Louis, Missouri 63102



Dear Mr. McClellan:

This letter is in response to your opinion request asking:

"May persons eighteen through twenty years  
of age be commissioned as Judges and Clerks  
of Elections (Section 118.060(2), RSMo 1969)?"

Section 118.060(2), RSMo, to which you refer, requires among other things, that such judges and clerks "must be citizens of the United States and entitled to vote in the city at the next general election."

The legal voting age in Missouri is now eighteen years of age or older. Twenty-sixth Amendment, United States Constitution. Section 118.030 (House Bill No. 1216, 76th General Assembly, Second Regular Session).

Therefore, persons eighteen years of age or older may be commissioned as judges and clerks of elections under Section 118.060 if they meet the other requirements under that section and for voting at the next general election.

Very truly yours,

JOHN C. DANFORTH  
Attorney General



June 5, 1973

OPINION LETTER NO. 202

Answer by letter-Bartlett

Dr. Arthur L. Mallory  
Commissioner of Education  
State Department of Education  
Jefferson State Office Building  
Jefferson City, Missouri 65101



Dear Commissioner Mallory:

In accordance with your request of May 25, 1973, we have reviewed the Missouri State Board of Education's "Application for Program Grant for Migratory Children (fiscal year 1974)." This application is being submitted under Title I of the Elementary and Secondary Education Act of 1965, P.L. 89-10, as amended by P.L. 89-750, P.L. 90-247, P.L. 91-230, and P.L. 92-318 (Section 20 U.S.C. Section 241e(c)).

In addition to the Elementary and Secondary Education Act of 1965, as amended, and the regulations propounded pursuant thereto (45 C.F.R. 116, October 1, 1972 edition), our review has taken into consideration Article III, Section 38(a), Missouri Constitution, and Sections 161.092 and 178.430, RSMo 1969.

Based on the foregoing, we hereby certify that the Missouri State Board of Education has authority under State law to perform the duties and functions of a "state educational agency" as defined in Title I of Public Law 89-10 (20 U.S.C. Section 244), including those arising from the assurances set forth in the application. The State Board of Education has the authority to administer the educational programs and projects for migratory children as set forth in the application and the purported restrictions on this authority set forth in paragraph 11 B.1. on



Dr. Arthur L. Mallory

page 9 and paragraph 15 A.2. on page 22 of the application are contrary to law. Barrera v. Wheeler, \_\_\_\_ F.2d \_\_\_\_ (8th Cir. March 16, 1973).

This opinion letter constitutes our official certification and should be inserted in the appropriate place in each copy of the application.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

June 27, 1973

OPINION LETTER NO. 205  
Answer by Letter - Klaffenbach

Honorable Frederick T. Dyer  
State Representative, District 51  
1025 Sherbrook  
St. Charles, Missouri 63301



Dear Representative Dyer:

This letter is in response to your opinion request asking:

"May a second class county advance or loan funds from either its general fund or from revenue sharing funds to a sewer district created under Chapter 204.250 R.S.Mo. 1969 for organizational expenses to be paid back to the county out of the proceeds of a revenue bond sale by the district?"

The common sewer districts to which you refer are created under the provisions of Sections 204.250, RSMo et seq., as amended.

In our opinion No. 193, dated June 12, 1969, to Moore, we held that revenue derived from a county tax levy under Section 137.555, RSMo, cannot be expended for such sewer district purposes. In that opinion we also noted the provisions of Section 204.360, which provide in part:

"The cost of any common sewer district of acquiring, constructing, improving or extending a sewerage system may be met:

\* \* \*

"(2) From any other funds which may be obtained under any law of the state or of the United States or from any county or municipality for that purpose; or . . ."

Honorable Frederick T. Dyer

We stated in passing on the particular question respecting the use of funds earmarked for road and bridge purposes that the provisions of subsection (2), above, contemplate "that funds may be obtained by the district from the county". To the extent that this statement indicated that subsection (2) is in itself an authorization to use any county funds for such sewer district purposes, the statement in the prior opinion was not fully clarified.

That is, a county court is invested with such powers only with reference to the management of the affairs of the property and business of the county as are expressly conferred on it by statute and such as may be fairly implied from those expressly granted. Walker v. Linn County, 72 Mo. 650 (1880). Our view of subsection (2) is, that it is not a grant of power to counties to make gifts or loans to such sewer districts and that express statutory authorization for such expenditures or loans is necessary.

We find no such express authority and conclude that there is no authority for the county to loan money to the sewer district.

It is also our view that this conclusion is applicable to "revenue sharing" funds. This is because Section 123(a) of the State and Local Fiscal Act of 1972, P.L. 95-512, provides that in order to qualify for any entitlement the unit of local government must establish to the satisfaction of the secretary of the treasury that it will expend amounts received under the Act only in accordance with the laws and procedures applicable to the expenditure of its own revenues.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

June 11, 1973

OPINION LETTER NO. 209  
Answer by Letter - Klaffenbach

Honorable John D. Schneider  
Missouri Senate, District 14  
418 State Capitol Building  
Jefferson City, Missouri 65101



Dear Senator Schneider:

This letter is in response to your question asking whether a city may exclude nonresidents from the use of the city swimming pool or ice rink facility and whether it makes any difference whether city funds, state funds, or federal funds are involved.

You have also asked us for an early answer to this question, and therefore, we have prepared our answer as concisely and quickly as possible.

The fundamental propositions of law as stated by the various courts in the United States are of a general nature and not particularly decisive of the question. That is, it is stated that a "park" is a place open for everyone and that the term carries no idea of restriction to any part of the public, and, conversely, that a park may be primarily for the benefit of the inhabitants of the municipality in which it exists. 67 C.J.S. "Park", p. 861. Other authorities hold to the proposition that a public park is "confessedly public". 59 Am. Jur. 2d, "Parks" §16.

However, the only case that we find which is clearly in point is McClain v. City of South Pasadena, 318 P.2d 199 (1957), in which the District Court of Appeal, Second District, Division 3, of the State of California, held that a regulation of a municipal corporation excluding all nonresidents, irrespective of race, color, or creed, from the use of a municipal plunge bore a reasonable and substantial relation to the health, safety,

Honorable John D. Schneider

morals, and general welfare of the residents of the city and was a reasonable classification. In so holding the court stated at l.c. 210:

"The regulation excludes all nonresidents, irrespective of race, color, or creed. It operates equally on all persons similarly situated and uniformly on all persons within the same class. Nonresidents are not situated similarly to residents. Persons are not similarly situated if there is any reasonable difference in their relation to the purposes of the regulation. The classification is reasonably related to the end in view. It bears a real and substantial relation to the health, safety, morals, and general welfare of the residents of South Pasadena. South Pasadena has the sovereign duty of maintaining the health of its residents. *Kellar v. City of Los Angeles*, 179 Cal. 605, 608, 178 P. 505. It owes no such duty to nonresidents. Residents are entitled to preference over nonresidents and such action is not in contravention of the rights of nonresidents. The primary purpose of a municipal corporation is to contribute toward the welfare, health, happiness, and interest of the inhabitants of such corporation, and not to further the interests of those residing outside its limits. 37 Am. Jur. 736, §122. There is no classification of racial groups residing within South Pasadena. If plaintiff's position were sustained, nonresidents of South Pasadena from anywhere in the country would have carte blanche to use the plunge. The regulation restricting use of the plunge to residents of South Pasadena was a reasonable regulation.

"We are not to be understood as implying that an owner of property in a municipality who is a nonresident thereof could be excluded from use of a plunge owned by the municipality. That question is not before us."

We are of the view that the holding and the reasoning of the McClain case is sound. However, as we have no particular factual situation before us we do not purport to say that any particular exclusionary regulation or ordinance is valid.

Honorable John D. Schneider

Further, we cannot in the premises state what the proper conclusion would be if state or federal funds were involved. The McClain case held that the use of federal funds did not affect the city's right to prohibit use of the plunge by nonresidents because the terms under which the federal gift was received did not preclude the city from excluding nonresidents. Clearly, the terms of the federal grant involved may affect the validity of such exclusion.

We do not determine what the situation may be if "state funds" are involved because our attention has not been directed to the source or substantive provisions respecting such "state funds".

Very truly yours,

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

July 20, 1973

OPINION LETTER NO. 214

Dr. Arthur L. Mallory  
Commissioner of Education  
State Department of Education  
Jefferson State Office Building  
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This letter is issued in response to your request for a ruling on the authority of the State Board of Education to enter into an agreement modifying the Section 221 agreement between the State Board of Education and the Secretary of the United States Department of Health, Education, and Welfare to carry out the provisions of the Social Security Act, as amended. Both the existing Section 221 agreement and the proposed modification agreement concern the making of determinations of disability under Section 221 of the Social Security Act. The modification agreement is primarily for the purpose of carrying out the provisions of recently enacted Title XVI of the Social Security Act. You further request a ruling on your authority to sign for the State Board of Education.

As indicated in a memorandum your office received from Region VII, Department of Health, Education, and Welfare, dated May 11, 1973:

"The major thrust of the modification is the inclusion of claims filed under Title XVI and requiring a determination of disability within the jurisdiction of State agencies currently providing the disability determination service under Title II of the Social Security Act."

The modification agreement indicates that its purpose is:



Dr. Arthur L. Mallory

"... to obtain the assistance of the State under Section 1633 in the administration of Title XVI of the Social Security Act, as amended, and to facilitate administration under Title II.

"In any respects not inconsistent with the modification, the provisions of the foregoing Section 221 agreement shall apply to claims under Title XVI by individuals within the State."

To prepare answers to your questions, we have reviewed (1) the Section 221 agreement between the State of Missouri and the Secretary of Health, Education, and Welfare, dated July 11, 1966 (superseding the original agreement, dated June 24, 1955), and all modifications thereof; (2) the supplement to the Section 221 agreement, dated June 23, 1970; (3) modification No. 1 to the Section 221 agreement; and (4) Section 161.182, RSMo 1969, as amended by House Bill No. 502, 77th General Assembly, effective June 14, 1973.<sup>1</sup>

House Bill No. 502, amending Section 161.182, RSMo 1969, reads as follows:

"161.182. 1. The state board of education shall enter into an agreement on behalf of the state with the Secretary of the U. S. Department of Health, Education and Welfare to carry out the provisions of the Federal Social Security Act, as amended, (42 U.S.C.A. 301 et seq.) relating to the making of determinations of disability under such Act.

"2. All moneys paid by the federal government to the state to carry out the agreement referred to in subsection 1 shall be deposited in the state treasury to the credit of a special fund to be

---

Footnote

1. House Bill No. 502 had an emergency clause and, therefore, became effective on the date signed by the Governor--June 14, 1973.

Dr. Arthur L. Mallory

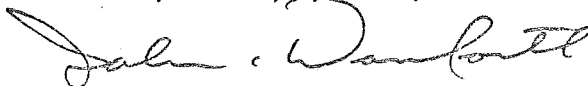
known as the 'Disability Freeze Fund', which is hereby created. All moneys in the fund shall be disbursed on warrants issued in accordance with requisitions of the state board of education."

Based on the express wording of House Bill 502, we conclude that the State Board of Education has authority to enter into an agreement to carry out the provisions of the Social Security Act, as amended. See Opinion No. 96, Wheeler, June 15, 1955.

You inquire about your authority to execute this agreement on behalf of the State Board of Education. Section 161.182 authorizes the State Board of Education, not the Commissioner of Education, to enter into agreements of this type. The Commissioner of Education is not a member of the State Board of Education nor is he generally authorized to perform those duties and responsibilities specifically granted to the State Board of Education. See Chapter 161, RSMo 1969, for general duties of the State Board of Education and the Commissioner of Education. Therefore, only the State Board of Education has the power to approve and enter into an agreement of the type referred to in Section 161.182. However, the State Board of Education could authorize you to sign this modification agreement on its behalf. Preferably this authorization should be by written resolution of the State Board of Education. A copy of the resolution should be attached to the modification agreement.

Therefore, it is the conclusion of this office that the State Board of Education is authorized to enter into an agreement modifying the existing Section 221 agreement between the Secretary of Health, Education, and Welfare and the State of Missouri to carry out the provisions of the Social Security Act, as amended. The State Board of Education may authorize the Commissioner of Education to sign this agreement on behalf of the State Board of Education.

Very truly yours,



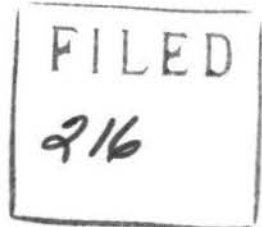
JOHN C. DANFORTH  
Attorney General

Enclosure:  
Opinion No. 96, Wheeler, 6/15/55.

June 27, 1973

OPINION LETTER NO. 216

Dr. Arthur L. Mallory  
Commissioner of Education  
State Board of Education  
Jefferson State Office Building  
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This letter is in response to your request for our review and certification of the State Board of Education's State Plan for fiscal year 1974, under Title III of the Elementary and Secondary Education Act of 1965, as amended.

Our review has taken into consideration Title III of the Elementary and Secondary Education Act of 1965, P.L. 89-10, as amended; the Federal Regulations (45 C.F.R. 118, October 1, 1972 edition); Article III, Section 38(a) and Article IX, Section 2(a), Missouri Constitution; Section 178.430, RSMo 1969, and related provisions.

It is the opinion of this office that:

1. The Missouri State Board of Education is the "State Educational Agency" required by Section 305(a)(1)(c), Public Law 89-10, Title III, as amended, to have authority to act as the sole agency to submit the State Plan;
2. The Missouri State Board of Education has authority under State law to carry out or arrange for the carrying out of the programs described in the State Plan;
3. All State Plan provisions with respect to the use of funds under Title III can be carried out in the State;

4. All provisions of the State Plan are consistent with State law with the exception of the proviso portion of paragraph 16 of the Assurances and paragraph 3 of Section 2.3.13 of the Plan.

In conjunction with this Letter Opinion which constitutes our official certification of the State Plan, we have completed a certification form consistent with this Opinion Letter.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

CLEAN AIR:  
AIR CONSERVATION:

prevent the construction of "complex sources" when it is determined that such sources may indirectly cause ambient air quality standards to be violated.

The Missouri Air Conservation Commission does not have the authority under Chapter 203, V.A.M.S., to pre-

OPINION NO. 218

August 21, 1973

Harvey D. Shell, P.E.  
Executive Secretary  
Air Conservation Commission  
117 Commerce Drive  
Jefferson City, Missouri 65101



Dear Mr. Shell:

This is in response to your request for an official opinion of this office concerning the question whether the Missouri Air Conservation Commission has the authority to prevent the construction of "complex sources" when it is determined that such sources may indirectly cause ambient air quality standards to be violated.

You have advised that your request is prompted by recent amendments to Part 51 of Chapter I, Title 40, Code of Federal Regulations, promulgated by the Administrator of the Environmental Protection Agency pursuant to the Clean Air Act, 42 U.S.C. 1857 et seq. which deal with the maintenance of national ambient air quality standards. Federal Register, Vol. 38, No. 116 - June 18, 1973. One purpose of the regulations is set out in Section 51.11 (a) (4) as follows:

"Prevent construction, modification, or operation of a facility, building, structure, or installation, or combination thereof, which directly or indirectly results or may result in emissions of any air pollutant at any location which will prevent the attainment or maintenance of the national standard."

The regulations then put the burden on the state and local air pollution control agencies to attain this purpose, primarily by the review of construction plans of such facilities with the power to deny and prevent such construction if it will prevent meeting the ambient air quality standards.

Harvey D. Shell, P.E.

There is no use of the term "complex sources" in the federal regulations but you have characterized such a source as "a large supermarket, airport, sports arena, drive-in theatre, etc., which attracts many people, and sometimes causes unnecessary traffic congestion." This is based on Section 51.18(a) of the regulations which provide:

"Each plan shall set forth legally enforceable procedures which shall be adequate to enable the State or a local agency to determine whether the construction or modification of a facility, building, structure, or installation, or combination thereof, will result in violations of applicable portions of the control strategy or will interfere with attainment or maintenance of a national standard either directly, because of emissions from it, or indirectly, because of emissions resulting from mobile source activities associated with it." (emphasis supplied)

Appendix O to the regulations elaborates on what types of facilities would be included and in addition to examples stated in your letter include highways and major parking facilities.

Thus, even though the facility itself would not have emissions interfering with the national ambient air quality standards, if there was sufficient motor vehicle traffic connected with the facility interfering with the national standards, then the federal regulations would require denial of construction of the facility. However, approval of construction does not relieve the owner of responsibility. Subsection (d) of Section 51.18 of the federal regulations reads:

"Such procedures shall provide that approval of any construction or modification shall not affect the responsibility of the owner or operator to comply with applicable portions of the control strategy."

Thus, we come to your question of whether the Commission has the authority under state law to accomplish the federal regulatory scheme.

Section 203.030, V.A.M.S., of the Missouri Air Conservation Law sets out the intent of the law and reads in part:

"The discharge into the ambient air of air contaminants so as to cause or contribute to air

Harvey D. Shell, P.E.

pollution is contrary to the public policy of Missouri and in violation of this chapter.  
. . ."

The Commission's powers are set out in Section 203.050, V.A.M.S., and include the power to adopt rules and regulations, including but not limited to:

"(a) Regulation of use of equipment known to be a source of air contamination; and

"(b) Establishment of maximum quantities of air contaminants that may be emitted from any air contaminant source;"

Section 203.075, V.A.M.S., provides for construction permits, reading in part:

"1. It shall be unlawful for any person to commence construction of any air contaminant source in this state after August 13, 1972 without a permit therefor, if such source is of a class fixed by regulation of the commission which requires a permit therefor.

\* \* \*

"3. Before issuing a permit to build or enlarge an air contaminant source the executive secretary shall determine if the ambient air quality standards in the vicinity of the source are being exceeded and shall determine the impact on the ambient air quality standards from the source. The executive secretary, in order to effectuate the purposes of this act, may deny a permit if the source will appreciably affect the air quality standards or the air quality standards are being substantially exceeded."

Section 203.150, V.A.M.S., provides in part:

"It is unlawful for any person to cause or permit any air pollution by emission of any air contaminant from any air contaminant source located in Missouri, in violation of this act, or any regulation promulgated by the commission.  
. . ."



Harvey D. Shell, P.E.

"Air contaminant source" is defined as "any and all sources of emission of air contaminants whether privately or publicly owned or operated;" Section 203.020(3), V.A.M.S.

"Emission" is defined as "the discharge or release into the atmosphere of one or more air contaminants;" Section 203.020(10), V.A.M.S.

"Emission control regulations" is defined as "limitations on the emission of air contaminants into the ambient air;" Section 203.020(11), V.A.M.S.

After reading all the provisions of the state law cited and quoted above, it is apparent that the legislative scheme is to impose controls on persons for air contaminants being emitted directly from facilities under their control. There is no provision in the state law similar to that in the proposed federal regulations imposing controls on facilities "because of emissions resulting from mobile source activities associated with it." Section 51.18(a). Nor in our opinion can such power be implied. Because of the complexity and broad implications inherent with such a scheme affecting the construction of highways, airports, and major land developments, the legislature should explicitly spell out the extent of such powers that the Commission should exercise.

#### CONCLUSION

It is the opinion of this office that the Missouri Air Conservation Commission does not have the authority under Chapter 203, V.A.M.S., to prevent the construction of "complex sources" when it is determined that such sources may indirectly cause ambient air quality standards to be violated.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

September 4, 1973

OPINION LETTER NO. 222  
Answer by letter-Nowotny

Honorable Christopher S. Bond  
Governor of Missouri  
Executive Office  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Governor Bond:

This is in reply to your request for an opinion of this office concerning the authority of the Office of Administration to authorize expenditures from appropriations in accordance with directives received from the Committee on State Fiscal Affairs contrary to the provisions of an appropriation act.

You state that the Office of Administration periodically receives copies of correspondence from the Committee on State Fiscal Affairs to various state agencies approving requests to pay certain costs by ignoring appropriation objects. Such approvals are normally given with prior verbal or written approval of the Budget Division. An example of such correspondence is a copy of a letter enclosed with your opinion request dated May 17, 1973, from Mr. John E. Hayes, Director of the Committee on State Fiscal Affairs, to Mr. Edward G. Farmer, Jr., Superintendent of the Division of Insurance, which letter reads as follows:

"Your request to pay certain Equipment Purchase and Repair items and certain Operation items from the Personal Service account was approved by the Committee on State Fiscal Affairs in its May 16, 1973 meeting."

Other examples of a similar nature were also enclosed with your opinion request.

Honorable Christopher S. Bond

Enclosed is a copy of Opinion Letter No. 347 dated June 18, 1971, to E. J. Cantrell, issued by this office holding that the Committee on State Fiscal Affairs has no authority to allow a transfer of appropriated funds under separate sections of appropriation bills nor to authorize an acceleration of program allotments. This conclusion was based on an analysis of Sections 21.500 and 23.050, RSMo, which set out the duties of the Committee. It is our opinion that the reasoning of Opinion Letter No. 347 is applicable here. Therefore, it is our opinion that the Office of Administration has no authority to allow expenditures from appropriations in accordance with directives received from the Committee on State Fiscal Affairs contrary to the provisions of an appropriation act.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

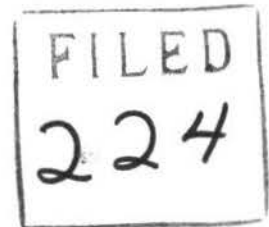
Enclosure: Op. Ltr. No. 347  
6-18-71, Cantrell

ELECTIONS: A voter using a voting machine in  
PRIMARIES: a state primary election must de-  
POLITICAL PARTIES: clare the political party for which  
VOTING MACHINES: he desires to vote or that he wishes  
to vote a nonpartisan ballot before  
entering the voting booth. The voting machine must be set so that  
the voter can vote only according to such choice.

OPINION NO. 224

July 11, 1973

Mr. James S. McClellan, Chairman  
Board of Election Commissioners  
City of St. Louis  
208 South 12th Boulevard  
St. Louis, Missouri 63102



Dear Mr. McClellan:

This opinion is in response to your question asking:

"Legality of eliminating the necessity of voters declaring party affiliation in the primary elections where voting machines are used and where the voting machines have been adapted so that the voter is able to select the political party after the curtain is drawn and further that the voter cannot vote on the machine for candidates of more than one political party."

Section 121.230, RSMo, provides that voting machines may be used at primary elections.

It appears that part of the difficulty in determining the intent of the legislature in the premises lies in the provisions of Section 122.810, RSMo, which states:

"No person shall be entitled to vote at any primary unless a qualified elector of the precinct and duly registered therein, and known to affiliate with the political party named at the head of the ticket he calls for, or will make affidavit or furnish proper proof that he is affiliated with the party whose ticket he calls for, or obligates himself under oath to support the nominee of said party at the following city election."

Mr. James S. McClellan

The above provisions which relate to municipal primaries in the City of St. Louis are the same as they were in the Revised Statutes of 1939 and have not been amended since then. By comparison the provisions of Sections 120.460 and 120.470, RSMo 1959, of the general laws respecting primary elections were respectively amended and repealed to eliminate the requirement, similar to that of Section 122.810, that the voter be known to affiliate with the party whose ticket he calls for and obligates himself to support the party nominees. While the failure of the legislature to amend Section 122.810 may have been an oversight, we believe that any interpretation based on these sections would be misleading.

We note that the legislature has not seen fit to amend the general laws respecting primary elections where paper ballots are used to allow the voter a multiple party ballot from which he can pick and choose the party ballot he wishes to vote. (Cf. House Bill Nos. 285, 323, 382, First Regular Session, 77th General Assembly, which did not pass.) Quite the contrary, the latest enactment of Section 120.450, as part of Senate Bill No. 135, 75th General Assembly (Laws 1969, p. 237) which bill also repealed Section 120.470 and amended Section 120.460, provides in part:

"1. At all primary elections there shall be as many separate ballots as there are parties entitled to participate in the primary election. There shall also be a nonpartisan ballot upon which, under appropriate title of each office, shall be printed the names of all persons by whom declaration papers have been filed as required by sections 120.300 to 120.650 who do not announce by such declaration papers as candidates for any political party as defined by sections 120.300 to 120.650. The names of all candidates shall be arranged under the appropriate title of the respective offices and under the proper party or nonpartisan designation upon the party ballot or upon the nonpartisan ballot, as the case may be.

\* \* \*

"7. In any primary election each qualified voter shall be entitled to receive from the judge of the election one ballot of the political party participating in the election for which he desires to vote. The judges of the election shall deliver the ballot to the voters. Before delivering any ballot to

Mr. James S. McClellan

the voter, the two judges of election having charge of the ballot shall write their names or initials upon the back of the ballot with indelible pencil, and no other writing shall be on the back of the ballot except as provided by law."

The question then is whether we can say that the legislature intended that voters using voting machines would be able to select the party for which they desire to vote in secret after the curtains have closed in the voting booth. In order to reach a conclusion that voters using the voting machines would not have to declare the party for which they desire to vote we would have to also conclude that the legislature intended to treat such voters differently than voters using paper ballots, or to express it in another way, that the legislature intended to allow the voters using machines to be treated differently than voters using ballots. A strange and unusual construction of a statute is not indulged in unless compelled. A change in established practice is not to be found by mere implication.

In view of the fact that the legislature has not changed the requirements for voters using paper ballots at primaries and in light of the fact that the general laws apply unless inconsistent with the laws respecting the use of voting machines, Section 121.260, RSMo, we are of the view that such voters must declare the party for which they desire to vote and that the voting machines must be set accordingly before the voters use the machines.

In reaching this conclusion we bear in mind that there is an obvious historical and present difference between nominating elections and general elections. The nominating election is essentially a party election. Although the primaries are an integral part of the election machinery of the state, and as such, subject to the control and regulation by the state and not solely a concern of a particular political party, Totton v. Murdock, 482 S.W. 2d 65 (Mo. banc 1972), the primary is nevertheless a fundamental political process of a political party. Thus in the absence of a clear expression to the contrary by the legislature which applies uniformly to all voters alike we conclude that voters using voting machines, as well as those using paper ballots, in primary elections, must declare the party for which they desire to vote or that they wish to vote a nonpartisan ballot before voting. The voting machine must be set so that the voter can vote only according to such choice.

We note that the question we have considered involves something more than mere technical procedure. Clearly, any such change in the voting procedure at state primary elections must be made by the General Assembly.

Mr. James S. McClellan

CONCLUSION

It is the opinion of this office that a voter using a voting machine in a state primary election must declare the political party for which he desires to vote or that he wishes to vote a nonpartisan ballot before entering the voting booth. The voting machine must be set so that the voter can vote only according to such choice.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH  
Attorney General



STATE AGENCY:

CONSTITUTIONAL LAW:

ENVIRONMENTAL PROTECTION AGENCY:

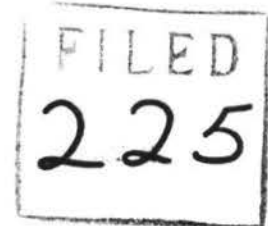
The Environmental Improvement Authority (EIA), created by House Bill No. 1041, 76th General Assembly, is not a "state agency" within

the meaning and operation of Sections 13, 23, 24, and 27 of Article IV of the Constitution of the state of Missouri and that the revenues of the Authority are not within the meaning of "state funds" as used in Article IV, Section 15.

OPINION NO. 225

November 19, 1973

Honorable James R. Strong  
Representative, District 119  
1006 Fairmount Boulevard  
Jefferson City, Missouri 65101



Dear Representative Strong:

This opinion is in response to your request for an official opinion on the question of whether the State Environmental Improvement Authority is a state agency within the context of Sections 13, 15, 24, and 27 of Article IV, Constitution of Missouri.

The State Environmental Improvement Authority (EIA) was created by House Bill No. 1041, 76th General Assembly, Second Regular Session, 1972. It became effective on January 22, 1973. The basic purpose of the Authority is summarized in Section 3 of the bill, as follows:

"The authority is authorized to provide for the conservation of the air, land and water resources of the state by the prevention or reducing the pollution thereof and proper methods of disposal of solid waste and to further such programs the authority is authorized to acquire and construct projects and to issue bonds and notes as herein provided to pay the costs thereof. Any such projects shall be in furtherance of applicable federal and state standards and regulations."

As we understand the reason for your inquiry, you are specifically interested in whether the revenues collected from the sale of bonds, and fees connected thereto, are revenues of the state,

Honorable James R. Strong

and must go into the state treasury, and therefore must also be appropriated to the Authority before they can be expended or utilized under the act.

Article IV, Section 15, states that the State Treasurer shall be custodian of "all state funds." It further requires that ". . . All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, . . ."

Article IV, Section 13 requires the State Auditor to post-audit the accounts of all "state agencies." Article IV, Section 23, states that the fiscal year of the state "and all its agencies" shall begin on the first day of July in each year and that the General Assembly shall make appropriations for one or two fiscal years.

Article IV, Section 24, requires, among other things, that the Governor submit to the General Assembly a complete and itemized plan of proposed expenditures of the state and "all its agencies." Article IV, Section 27, gives the Governor the power to reduce the expenditures of the state "or any of its agencies" in certain circumstances.

It is clear, then, that the General Assembly's responsibility with regard to appropriations for the State Environmental Improvement Authority hinges on the issue of whether the Authority is an "agency" within the scope of Sections 13, 23, 24, and 27 of Article IV. If the Authority is an "agency" of the state, in that sense, revenues so collected by it would clearly be "state funds" required by Article IV, Section 15, to be deposited in the state treasury, which would make the Authority dependent upon legislative appropriations in order to carry out its functions.

However, for the reasons outlined below, we are of the opinion that the State Environmental Improvement Authority is not an "agency" within the purview of Sections 13, 23, 24, and 27 of Article IV and that the revenues collected by it are not "state funds" as the term is used in Article IV, Section 15.

Upon examining the provisions of the State Environmental Act, it seems clear that the legislature intended to create a self-sufficient, independent instrumentality, invested with specific powers and authority to perform a specific function.

Section 1(3) of the act, for example, indicates that the EIA is to be self-sustaining. It reads, in pertinent part:

"(3) 'Cost', the expense of the acquisition of land, rights-of-way, easements and

Honorable James R. Strong

other interests in real property and the expense of acquiring or constructing buildings, improvements, machinery and equipment relating to any project . . . all of which are to be paid out of the proceeds of the bonds authorized by this act;" (Emphasis added)

Section 11 reiterates this directive. It provides, in pertinent part:

"Any resolution authorizing any notes or bonds may contain such provisions, covenants and agreements subject to any provisions, covenants and agreements with the holders of bonds or notes then outstanding as the authority determines necessary. Such provisions, covenants and agreements may include but shall not be limited to:

\* \* \*

(3) The fixing of rents, fees and other charges and the pledging of the same and of the revenues of the authority so that the same will be sufficient to pay the cost of operation, maintenance and repair of any project and the principal of and interest on notes or bonds secured by the pledge of such revenues;" (Emphasis added)

Section 7 of the act grants the EIA the authority to, among other things, adopt an official seal; to sue and be sued; to make and execute leases and contracts; to acquire, hold and dispose of real and personal property; and to hire employees and contract for services.

Section 13 stipulates that the notes and bonds issued by the EIA shall not constitute an indebtedness of the state and exempts the state from liability thereon. Section 15 provides that any projects acquired or maintained by the Authority shall be subject to real and tangible personal property taxes of the state or any of its subdivisions. Section 17 provides, in effect, that all rights and properties of the Authority remain vested in the Authority until its termination or dissolution. Only then do they pass to the state.

An examination of the foregoing provisions supports the conclusion that the EIA is not a "state agency" within the context under

Honorable James R. Strong

consideration. Rather, the EIA is similar to a quasi-public corporation or quasi-corporation. It has precise duties which may be enforced and privileges which may be maintained by suits at law.

Examine, too, the language of Section 2 of the EIA Act:

"There is hereby created and established as a governmental instrumentality of the state of Missouri, the 'State Environmental Improvement Authority' which shall constitute a body corporate and politic." (Emphasis added)

Furthermore, we take notice of the fact that the phrase is used several times to describe the Municipal Land Clearance for Redevelopment Authorities which are authorized and created by Sections 99.300 et seq., RSMo 1969. These authorities possess duties and powers similar to the EIA. We take note of the fact that these authorities have never been considered "agencies" for purposes of Sections 13, 23, 24, and 27 of Article IV.

Nor have these authorities been assigned to a department pursuant to Article IV, Section 12, which requires that all ". . . boards, bureaus, commissions and other agencies of the state . . . be assigned . . . to the office of administration or to one of the fourteen administrative departments to which their respective powers and duties are germane. . . ." (Emphasis added) And while this may not necessarily be conclusive as to the EIA, it is certainly relevant.

Equally relevant is a decision of the Superior Court of New Jersey in Tumulty v. Jersey City, 155 A.2d 148 (Super.Ct. N.J. 1959). In Tumulty the court held that a municipal housing authority, authorized by state law, was a separate independent entity, "a body corporate and politic," and was an "instrumentality" of the municipality or county, exercising public and essential governmental functions. Thus, the court ruled that the housing authority was not a subordinate municipal agency which must be assigned to any one department, or whose powers and duties could be said to be appropriate to one or the other departments.

The court said, at pages 152-153:

"The Local Housing Authorities Law clearly indicates that a local housing authority is not a municipal function, but is a separate independent entity which is 'a body corporate and politic' created by the governing body of a municipality or county. It is an instrumentality of the municipality or county, exercising public and essential governmental functions, with, among other powers, power to sue

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and be sued; to have perpetual succession; to make and execute contracts and other instruments necessary and convenient to the exercise of its powers; . . . to sell, lease, exchange, transfer, assign, pledge or dispose of any real or personal property or any interest therein; to invest any funds held in reserve or sinking funds or any funds not required for immediate disbursement, in property or securities that are legal investments, etc. N.J.S.A. 55:14A-7. Thus, a local housing authority is not a subordinate municipal agency which must be assigned to any one department under the Walsh Act, or whose powers and duties can be said to be appropriate to one or the other department, within the meaning of R.S. 40:72-5, N.J.S.A. To the contrary, the Legislature did not want the Authority dominated by the governing body. It was to remain a separate corporate entity."

Although the decision dealt with an instrumentality performing governmental functions on a municipal level, it would seem clear that the court's reasoning would apply equally as well to an instrumentality performing governmental functions on a state-wide level, such as the EIA.

As pointed out previously, the EIA was created as a self-sustaining, independent entity, created for a particular purpose and vested with specific legally enforceable powers and duties to carry out that purpose. And while the word "agency" has various meanings according to context, we feel the above-mentioned characteristics of the Authority irreconcilably conflict with intended meaning of the word "agency" as used in Sections 13, 23, 24, and 27 of Article IV.

#### CONCLUSION

It is the opinion of this office that the Environmental Improvement Authority (EIA), created by House Bill No. 1041, 76th General Assembly, is not a "state agency" within the meaning and operation of Sections 13, 23, 24, and 27 of Article IV of the Constitution of the state of Missouri and that the revenues of the Authority are not within the meaning of "state funds" as used in Article IV, Section 15.

Honorable James R. Strong

The foregoing opinion, which I hereby approved, was prepared by my assistants, Walter W. Nowotny, Jr., and Philip M. Koppe.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Danforth" written in a more compact, flowing style.

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH  
ATTORNEY GENERAL

August 20, 1973

OPINION LETTER NO. 227

Honorable Jack E. Gant  
Missouri Senate, District 16  
9517 East 29th Street  
Independence, Missouri 64052

Dear Senator Gant:

This opinion letter is issued in response to your request for a ruling from this office as to the proper construction of the following underlined portion of Section 70.745, RSMo 1969, regulating the Missouri Local Government Employees' Retirement System:

"The board shall be the trustees of the funds of the system. The board shall have full power to invest and reinvest the moneys of the system, and to hold, purchase, sell, assign, transfer or dispose of any of the securities and investments in which such moneys shall have been invested, as well as the proceeds of such investments and such moneys; except that such investment and re-investment shall be subject to all the terms, conditions, limitations and restrictions imposed by law upon life insurance and casualty companies in the state of Missouri in making and disposing of their investments; except that the percentage limitations of subsection 2 of section 376.305, RSMo, shall not apply; and except that the system shall not increase its common stock investments by more than four percent of its assets in any one fiscal year after its first fiscal year."  
(Emphasis added.)



Honorable Jack E. Gant

One interpretation of the underlined portion of the statute would be to limit the increase in common stock investments from fiscal year to fiscal year to "four percent of its assets". For example, at the end of the fiscal year on June 30, 1970, the fund totaled \$5,284,337.56, with some \$1,273,099.30 (29.52%) invested in common stock. On June 30, 1971, total assets of the funds stood at \$9,602,841.76. Following this interpretation, the fund could have increased its common stock investment on June 30, 1971 only by a maximum of \$384,113.67 (4% of \$9,602,841.76). This would only allow a total of \$1,657,212.97 to be invested in common stocks on June 30, 1971. A different construction would be that the percentage of assets invested in common stocks on January 30, 1970 could be increased by 4% in the ensuing year. Thus, following this construction, the fund could have had \$3,218,872.50 (33.52% of \$9,602,841.76) invested in common stocks on June 30, 1971, instead of the \$1,657,212.97 as permitted by the other construction.

After reviewing the statute and applying the standard precepts of statutory construction, it is the opinion and conclusion of this office that the first construction placed upon the statute is the correct interpretation. The basic rule of statutory construction is to seek the legislative intention which should be ascertained from the words used, if that is possible, and in so doing, words should be given their plain and ordinary meaning so as to promote the object and manifest purpose of the statute. State ex rel. State Highway Commission v. Wiggins, 454 S.W.2d 899 (Mo. banc 1970); State ex rel. MFA Insurance Company v. Rooney, 406 S.W.2d 1 (Mo. banc 1966). Statutes should not receive strained, unnatural, or unreasonable constructions. Schroeder v. Davis, 32 F.2d 454 (8th Cir. 1929). Statutes must be construed as they stand. England v. Eckley, 330 S.W.2d 738 (Mo. banc 1959).

It is clear that the legislature in enacting Section 70.745, RSMo, intended to place a limit on the board's power to invest and reinvest the moneys and the assets of the system. Had the legislature intended that the overall common stock percentage could be increased up to 4% a year, the legislature could have specifically so provided. To read such a construction into the present statute would be strained and unnatural. The 4% allowable increase relates to "assets" not to common stock percentage. The word "assets" is to be given its plain and natural meaning. Placing this construction on the statute does not defeat the legislative intent and the statute is construed as it stands.

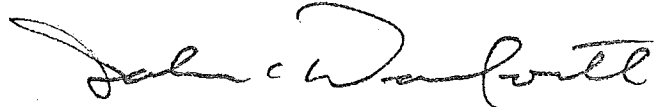
The decision as to the wisdom behind one approach or another approach with regard to limitations on the board's broad power to invest funds rest with the legislature. If the board of trustees

Honorable Jack E. Gant

feels that Section 70.745, RSMo, unreasonably restricts its power of investment so as to be economically and administratively unsound, new legislation should be sought.

For the foregoing reasons, it is the opinion and conclusion of this office that the legislature in enacting Section 70.745, RSMo 1969 relating to common stock investments, requires that the common stock increase from fiscal year to fiscal year be only 4% of the fund's assets and not a 4% common stock percentage increase.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a long horizontal stroke at the end.

JOHN C. DANFORTH  
Attorney General

MENTAL HEALTH:  
JUVENILES:  
MINORS:

The Division of Mental Health has the authority and the duty to charge for the care and treatment of a juvenile committed to the Division of Mental Health by the juvenile court or transferred to the Division of Mental Health from the State Board of Training Schools pursuant to Section 211.201, RSMo, if such person is determined to be a private patient pursuant to the provisions of Section 202.863, RSMo.

OPINION NO. 228

June 28, 1973

Harold P. Robb, M.D., Director  
Division of Mental Health  
722 Jefferson Street  
Jefferson City, Missouri 65101



Dear Dr. Robb:

This opinion is in response to your request in which you ask whether the Division of Mental Health has authority to charge for the care and treatment of a patient committed by a juvenile court where the patient is committed directly to the Division of Mental Health or where the patient is committed first to the State Board of Training Schools and then transferred to the Division of Mental Health.

Section 211.201, RSMo provides the authority by which juvenile court commitments are made directly to the Division of Mental Health and also the authority by which a child is transferred from the State Board of Training Schools to the Division of Mental Health. That section provides in full as follows:

"1. When a child coming under the jurisdiction of the juvenile court is found by the court to be epileptic, mentally deficient or otherwise mentally disordered, the juvenile court may commit the child to the division of mental diseases for care and treatment in a state school and hospital or in a state mental hospital and the order of commitment is binding upon the division. If the child, after proper observation, examination and diagnosis is found by the division of mental diseases not to be epileptic,

Harold P. Robb, M.D.

mentally deficient or mentally disordered so as to require care and treatment by the division of mental diseases, and if the juvenile court in its order committing the child to the division of mental diseases retains jurisdiction by the terms of its order of commitment, then the director of the division of mental diseases may make application, accompanied by a diagnosis and report, to the court which committed the child for an order relieving the division of custody of the child. If the committing court does not make an order relieving the division of mental diseases of custody of the child within twenty days after the receipt of the application, the jurisdiction of the committing court over the child terminates and the division of mental diseases is authorized to discharge the child from its custody or make such disposition as it deems necessary to promote the best welfare of the child.

"2. Whenever a child is committed to the state board of training schools and subsequently is found to be epileptic, mentally deficient or otherwise mentally disordered, the state board of training schools may order the transfer of the child to the division of mental diseases for care and treatment in an institution or hospital within the division subject to the jurisdiction of the board. The division shall without delay, accept the child for care and treatment for so long a period as is deemed necessary except that

"(1) if upon proper observation, examination and diagnosis by the medical staff of the institution to which he has been transferred, the child is found not to be epileptic, mentally deficient or mentally disturbed so as to require care and treatment in the institution or hospital, the director of the division of mental diseases shall so notify the state board of training schools and the child shall be returned to the custody of the state board of training schools;

"(2) when a child for any reason ceases to come under the jurisdiction of the state board of training schools, he may be retained

Harold P. Robb, M.D.

in the institution or hospital only after proper proceedings have been instituted and held as otherwise provided by law."

Further, Section 202.595, RSMo also provides that mentally retarded persons may be admitted to the Division of Mental Health on court order as provided in Section 211.201, RSMo.

Clearly, there is no question that the juvenile courts have authority to commit mentally retarded and mentally ill children within their jurisdiction to the Division of Mental Health.

Under Section 202.863, RSMo, the superintendents of the facilities of the Division of Mental Health are given authority to determine whether a person admitted to such a state facility is to be classified as a "private, state or county" patient.

Under Section 202.330, RSMo, the director of the Division of Mental Health is given authority to establish rates to be charged for private patients.

Further, Section 202.265, RSMo provides that the Division of Mental Health has the authority to recover appropriations used for the support or treatment or other services rendered to patients of any of the facilities of the division from any person who is bound to provide for the support and maintenance of such person.

Therefore, in answer to your first question, with respect to charges for persons committed directly to the Division of Mental Health by the juvenile court, it is clearly our view that the Division of Mental Health has the authority as well as the duty to make such charges in all instances where the person admitted to the institution is not indigent or the person or persons responsible for the care of such person are not indigent.

In answer to your second question, we see no reason why children transferred to the Division of Mental Health from the State Board of Training Schools under subsection 2 of Section 211.201 should be treated any differently than any other patients with respect to charges for care and treatment. In such a situation the statutes that we have cited and quoted above and the general laws with respect to parental responsibility still apply.

It should be borne in mind that the facilities of the Division of Mental Health exist essentially to provide care and treatment for such persons. They are by no means penal facilities. Thus the benefit is for the individual and not solely for the public. See Department of Mental Health v. Pauling,

Harold P. Robb, M.D.

265 N.E.2d 159 (Ill.Sup. 1970); Schneider v. Department of Mental Health, 277 N.E.2d 870 (Ill.Sup. 1971); State v. Koslerek, 259 A.2d 151 (Conn.App.Div. 1969).

Finally, it should be clear that the mere fact that a commitment or transfer is involuntary does not relieve the patient having the means, the persons responsible for the care of such patient, or the estate of such patient, from the responsibility of paying the charges as determined by the director in accordance with the provisions of Section 202.330, RSMo.

In reaching our conclusions we recognize that Section 211.241, RSMo provides that the juvenile court may make determinations generally with respect to the support of children under its jurisdiction and has the authority to order execution to issue, if necessary, to enforce such orders, or may approve payment of county funds for the support of a child depending upon ability to pay for such support. Section 211.241 is a general statute, however, in that it applies to support of children committed to various institutions, agencies and persons as contrasted with the sections which we have cited and quoted which apply specifically to the payment of charges for persons committed to the Division of Mental Health. Therefore, to the extent of any conflict, the mental health statutes govern with respect to the determination of the amount of payment and the liability for care and treatment. Cf., State v. Siecke, 472 S.W.2d 367 (Mo. banc 1971).

#### CONCLUSION

It is the opinion of this office that the Division of Mental Health has the authority and the duty to charge for the care and treatment of a juvenile committed to the Division of Mental Health by the juvenile court or transferred to the Division of Mental Health from the State Board of Training Schools pursuant to Section 211.201, RSMo, if such person is determined to be a private patient pursuant to the provisions of Section 202.863, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN C. DANFORTH  
Attorney General



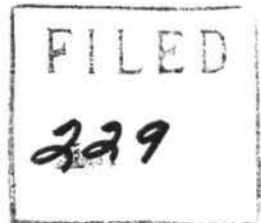
WATER POLLUTION:  
SEWERS:

Municipalities and sewer districts have authority to make the user charges to industries required by the Federal Water Pollution Control Act Amendments of 1972 and to establish the reserves for future expansion or reconstruction.

OPINION NO. 229

August 20, 1973

Mr. Jack K. Smith, Executive Secretary  
Missouri Clean Water Commission  
Post Office Box 154  
Jefferson City, Missouri 65101



Dear Mr. Smith:

This official opinion is issued in response to your request received by this office on June 19, 1973.

As we understand the situation, the basis for your request is the fact that the new Federal Water Pollution Act Amendments of 1972 require that public sewage treatment facilities make certain charges to industrial users and establish certain reserve or sinking funds with portions of these charges to be used for future expansion and reconstruction of the project. To quote from your opinion request:

"Section 204 of the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92-500) requires grantees to recover from industrial users of such treatment works that portion of the federal share of project costs allocable to industrial use; makes further requirements with respect to user charges; and provides for retention by the grantee of a portion of revenues derived from the payment of costs by industrial users, further requiring that a certain portion of the retained revenues be used solely for the purposes of future expansion and reconstruction of the project.

"Proposed Environmental Protection Agency regulations published May 22, 1973, to implement the cost-recovery and requirement,



Mr. Jack K. Smith

would require grantees to set aside at least 80 percent of the amounts retained pursuant to section 204(b)(3) for such future expansion and reconstruction.

"Does the Missouri law authorize or permit municipalities or other governmental units, such as sewer districts which might receive grants, to establish sinking funds or other segregated accounts to be held separately for eventual expenditure for expansion or reconstruction of the treatment works? Should or could a particular class of municipality establish its authority in this regard by charter ordinance, and is there a possibility of finding authority in acts enabling municipalities to obtain federal grants by complying with federal requirements?"

Senate Bill No. 321 of the 77th General Assembly, effective July 23, 1973, the date of its approval by the Governor, which is also known as the Missouri Clean Water Law, provides in Section 204.026(18) that the Clean Water Commission shall:

"Require that all publicly owned treatment works or facilities which receive or have received grants from the state or the federal government for construction or improvement, make all charges required by this act or any federal water pollution control act for use and recovery of capital costs, and the operating authority for such works or facility is hereby authorized to make any such charges;  
... " (Emphasis added)

Chapter 250, RSMo, provides authority, in addition to any specific grant of power elsewhere in the Revised Statutes to all cities, towns, villages, whether organized under general law or by special charter or constitutional charter, and to any sewer district organized under Chapter 249, RSMo, to acquire, construct, improve or extend and to maintain and operate a sewage system and provide funds for the payment of the cost of such acquisition, construction, improvement or extension in operation of the system. That chapter contains several provisions which bear on the question.

Subsection 1(2) of Section 250.150, RSMo, declares that the rates and charges collected for sewer services:

Mr. Jack K. Smith

". . . shall be devoted, first, to the payment of the expenses of operating and maintaining such system; second, to the payment of any and all bonds or other obligations payable from such revenue; third, to the establishment of a proper depreciation reserve for the benefit of such system; fourth, to the fulfillment of any covenants or agreements contained in any ordinance which may have authorized outstanding revenue bonds issued for the benefit of such system and, fifth, for the payment of the cost of improvements and extensions to such system."

Section 250.240, RSMo, provides:

"It is the purpose of this chapter to enable cities, towns and villages and sewer districts to protect the public health and welfare by preventing or abating the pollution of water and creating means for supplying wholesome water, and to these ends every such municipality and sewer district shall have the power to do all things necessary or convenient to carry out such purpose, in addition to the powers conferred in this chapter. This chapter is remedial in nature and the powers hereby granted shall be liberally construed."

Section 250.250, RSMo, indicates that the chapter is an additional grant of power and is not intended to repeal or modify any power otherwise granted by the statutes or Constitution or any special charter or constitutional charter. It concludes with the statement that:

". . . This chapter, without reference to any other chapter, shall be deemed sufficient authority for the exercise of any powers granted herein, and all powers necessary to effectuate the purposes of this chapter shall be deemed to be granted hereby."

In addition, Section 250.230, RSMo, provides that these governmental bodies are authorized to enter into contracts with any industry for the payment by that industry of:

". . . amounts at least sufficient, in the determination of such governing body, to

Mr. Jack K. Smith

compensate the municipality for the cost of providing (including payment of principal and interest charges, if any), and of operating and maintaining the sewage facilities serving such industrial establishment."

We assume that the requirement that a specified percentage of revenues be retained for expansion and reconstruction in accord with the federal law and regulations will not conflict with the priorities established under Section 250.150, RSMo.

#### CONCLUSION

Therefore, it is the opinion of this office that municipalities and sewer districts have authority to make the user charges to industries required by the Federal Water Pollution Control Act Amendments of 1972 and to establish the reserves for future expansion or reconstruction.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert M. Lindholm.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

November 16, 1973

OPINION LETTER NO. 232

Mr. Charles L. Arnold, Sr.  
Secretary, State Board of  
Embalmers & Funeral Directors  
West White Street  
Canton, Missouri 63435

Dear Mr. Arnold:

This opinion letter is issued in response to your request for an opinion whether:

"Can a licensed funeral director perform any acts upon the body of a deceased whereby the condition or appearance of that body might in any way be altered or changed? I am referring to those functions which have always been considered by this office to come under the duties of a licensed embalmer, namely the practice of dermatology consisting of the covering of unsightly stains with cosmetics, the masking of body mutilations with wax and cosmetics, and the normal cosmetic work involved in the preparation of a deceased for viewing."

The answer to your request depends, we believe, on the interpretation of the statutory definitions regulating embalmers and funeral directors.

Section 333.011 reads:

"As used in this chapter, unless the context requires otherwise, the following terms have the meanings indicated:

\* \* \*

Mr. Charles L. Arnold, Sr.

(2) 'Embalmer', any individual licensed to engage in the practice of embalming;

(3) 'Funeral director', any individual licensed to engage in the practice of funeral directing;

\* \* \*

(6) 'Practice of embalming', the work of preserving, disinfecting and preparing by arterial embalming, or otherwise, of dead human bodies for funeral services, transportation, burial or cremation, or the holding of oneself out as being engaged in such work;

(7) 'Practice of funeral directing', engaging by an individual in the business of preparing, otherwise than by embalming, for the burial, disposal or transportation out of this state of, and the directing and supervising of the burial or disposal of, dead human bodies or engaging in the general control, supervision or management of the operations of a funeral establishment."

We have not found any Missouri case involving these definitions or a prior statutory or common law definition. In Commonwealth v. Markmann, 144 Pa.Super. 29, 174 A. 6, 9 (1934), the court citing Webster's Dictionary defined embalm as ". . . to treat (a dead body) with special preparations, as aromatic oils or arsenic, in order to preserve it from decay. . . ."

Although not precisely in point, the Wisconsin Supreme Court in State ex rel. Kemplinger v. Whyte, 188 N.W. 607, 609 (Wis. 1922) after noting the dictionary definition of "undertaker" or "funeral director" and noting the statutory definition of embalmer<sup>1</sup> stated:

". . . It is apparent from these definitions of an undertaker and the statutory definition

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<sup>1</sup>"The disinfection or preservation of the dead human body, entire or in part, by the use of chemical substance, embalmer's fluid or gases on the body, or by the introduction of the same into the body, by either arterial or cavity embalming or by hypodermic injection of fluid ordinarily used for embalming." Whyte, loc. cit. 609 (Section 1409(2), Wisconsin Statutes of 1921).

Mr. Charles L. Arnold, Sr.

of embalming that the two are vitally different. An embalmer, as such, does not bury the dead; he does not take charge of funerals; he does not dress the body, procure the coffin, or do the many other things an undertaker does. His sole function as an embalmer is to so treat the body . . . so as to disinfect and preserve the body. . . ."

The case involved the constitutionality of Wisconsin statutes which required all undertakers to have an embalmers license in order to stay in business. The court held that the statute was unconstitutional since the functions were different and thus was unreasonable to require all undertakers to be embalmers. The court noted that there was no state statute requiring a body to be embalmed and further noted that in many rural parts of that state it was common practice that bodies were never embalmed.

Reading the statute to construe the statutory intent and giving the words their plain and ordinary meaning, it is clear that "embalming" as such is related solely to disinfecting and preserving a body from decay. Section 331.011(6) states that this is generally done by the injection of chemicals into the arteries. Like Wisconsin, Missouri has no statute requiring all bodies to be embalmed.<sup>2</sup> From your question, it is clear that the application of various waxes and cosmetics to a deceased is not related to the disinfecting and preserving of a body from decay. Rather, the purpose is to make the deceased suitable for viewing before the casket is finally closed. Also, it is clear the legislature did not intend that all funeral establishments had to have a licensed embalmer. It would be unreasonable to expect that a funeral establishment which did not have a licensed embalmer associated with it would be prohibited from making a body presentable for viewing.

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<sup>2</sup>There are only two instances in which a body must be embalmed under the provisions of state statutes.

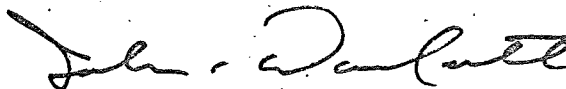
(1) If it is going to be transported by common carrier and if the individual died of certain dangerous or communicable diseases (See Sections 194.080 and 194.090, RSMo 1969). Or, the body can be shipped in a closed and hermetically sealed container.

(2) If the body is going to be transported by common carrier and if it is going to take twenty-four hours or longer to reach its destination. (See Section 194.100, RSMo 1969). Or, the body can be shipped in a closed and hermetically sealed container without being embalmed.

Mr. Charles L. Arnold, Sr.

Thus it is our view that the normal, simple cosmetic work is one of the functions that can be performed by a funeral director and is not within the exclusive business of a licensed embalmer. This letter is in no way to be regarded as an opinion as to any specific facts which might arise.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH  
Attorney General





JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

November 7, 1973

OPINION LETTER NO. 233

Mr. John A. Hailey  
Executive Secretary  
State Board of Registration  
for the Healing Arts  
Post Office Box 4  
Jefferson City, Missouri 65101

Dear Mr. Hailey:

This is in response to your request for an opinion of this office on the following question:

"May the State Board of Registration for the Healing Arts employ an attorney and pay said attorney from funds appropriated to the Board by the General Assembly."

Your opinion request indicates that the Board presently retains counsel and has done so for eight years.

We believe that under Section 334.230, RSMo, the Board has been authorized by the legislature to employ private counsel. That section provides in part as follows:

"If it appears upon complaint to the board by any person, or it is known to the board that any person is violating any of the provisions of this chapter, the board, by its own proper counsel, or the prosecuting attorney of the proper county, or the attorney general may investigate and may, in addition to any other remedies, bring action in the name of and on behalf of the state of Missouri at the relation of the board against any such person to enjoin him from such violation. . . ."

Mr. John A. Hailey

Not only does the above statutory section authorize the State Board to bring action on behalf of the state of Missouri to enjoin individuals from violating the provisions of Chapter 334 but, in addition, it is indicated that the Board may do so "by its own proper counsel" as well as by the prosecuting attorney or by the Attorney General.

Therefore, it is the opinion of this office, that the State Board of Registration of the Healing Arts may employ an attorney pursuant to Section 334.230, RSMo.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

December 6, 1973

OPINION LETTER NO. 235

Colonel Samuel S. Smith  
Superintendent, Missouri  
State Highway Patrol  
1510 East Elm  
Jefferson City, Missouri 65101

Dear Colonel Smith:

This letter is in response to your request for a ruling on the following question:

"If the annual salary of a member of the Missouri State Highway Patrol increases, may all five-year-service-salary increases which have been received by the member, as provided by Section 43.080, RSMo. 1969, be re-computed on the increased annual salary fixed by Section 43.070, RSMo. 1969, for the rank which the member holds?"

The relevant portion of Section 43.080, RSMo, reads as follows:

"The limitations upon the maximum salaries which may be paid under the provisions of this chapter shall not be applicable after any member of the patrol has served five years in the state highway patrol, and the superintendent is authorized and empowered, with the approval of the state highway commission, to prescribe rules and regulations providing for increases every five years in the salaries of such members beginning with

Colonel Samuel S. Smith

the sixth year of service, and thereafter to fix the salaries of such members in accordance therewith; provided, however, no such five-year increase shall exceed ten percent of the maximum salary fixed for the rank which the member holds by section 43.070; . . ."

The State Auditor, interprets the provisions of such section to mean that the increase is limited to ten percent of the salary a patrol member was receiving at the time he received the longevity increase. (See, Missouri State Highway Patrol Report of the State Auditor, July 1, 1969 - July 30, 1972). For instance, assume a patrol member with sixteen years of service was promoted to corporal in his sixteenth year. His first and second longevity increases, received in years six and eleven, would amount to \$65.00 per month (10% of the monthly salary of \$650.00 per month). His third longevity increase, received in the sixteenth year would be \$70.00 (10% of the maximum monthly salary for corporal, \$700.00 per month). The total longevity increase then, is \$200.00.

The patrol's interpretation in the above hypothetical case, gives the patrolman a longevity increase of \$65.00 per month in the sixth and eleventh years. However, in the sixteenth year, when the promotion is received, the patrol recomputes the first and second longevity increases to amount to \$70.00 (10% of the corporal's salary of \$700.00 per month). In the sixteenth year, the patrol also gives the third longevity increase of \$70.00 per month. The total longevity increase is then \$210.00. The patrol has viewed the increase as a percentage increase of the salary of the rank then attained rather than a dollar amount fixed at the end of each five-year period.

Section 43.080, RSMo, states that each increase may not exceed ten percent of the maximum salary fixed by Section 43.070, RSMo, for the rank which the member holds. A patrol member with sixteen years of service under the patrol's interpretation is entitled to an increase of thirty percent (10% for each five years) of the maximum salary under Section 43.070 for the rank he then holds.

The provision for longevity increases was first enacted in 1937. The patrol's interpretation was established at that time and has not changed since. The interpretation of an ambiguous statute by the agency charged with its execution, long acquiesced in, is a factor to be given great weight and should not be disturbed unless clearly erroneous. State ex rel. Union Electric Light & Power Co. v. Baker, 293 S.W. 399, 316 Mo. 853

Colonel Samuel S. Smith

(Banc 1927); State ex rel. Harline v. Public Service Commission of Missouri, 343 S.W.2d 177 (K.C.Ct.App. 1960). By statute, the regulations providing for the longevity increases were required to be approved by the State Highway Commission. Although this formal approval has apparently never been obtained; the Highway Commission, along with the legislature, has long acquiesced in the patrol's interpretation. This gives rise to an inference that the patrol's interpretation was correct. Robertson v. Manufacturing Lumbermen's Underwriters, 145 S.W.2d 134, 346 Mo. 1103 (1940).

The section authorizing the five-year increase has been amended twice. As first enacted, the provision in Section 8351, RSMo 1939, read:

"Provided, however, no such five-year increase shall exceed ten percent of the maximum salary fixed by this act."

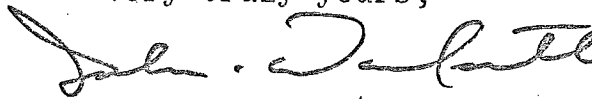
As reenacted in 1945, this proviso read that no "five-year increase shall exceed ten percent of the maximum salary fixed by Section 8349." Section 8349 fixed the maximum salaries for the officers of the patrol and Section 8350 fixed the maximum for patrolmen. Since such provisions might have been construed to authorize an increase of ten percent of an officer's salary for a patrolman, the statute was amended in 1949 to read "ten percent of the maximum salary fixed for the rank which the member holds by Section 43.070." House and Senate Journals, 65th General Assembly of the State of Missouri, Volume 3, 1949, page 68. The only amendments to this section have related to the base amount to which the percentage is applied. The remainder of the section has been reenacted without change. The general rule of construction is that a legislature in reenacting a section is presumed to know and adopt an administrative construction. While this is not a binding rule, it is a factor to be given serious consideration. Becker v. St. Francois County, 421 S.W.2d 779 (Mo. 1967).

The ultimate aim of any statutory construction is to determine and give effect to the intent and purpose of the legislature. St. Louis County v. State Highway Commission, 409 S.W.2d 149 (Mo. 1966). It seems clear that by enacting Section 43.080, the legislature intended that two factors be taken into account in determining the salary of a patrol member: (1) rank, and (2) length of service. It seems logical to infer that if these two factors are the same for two members of the patrol that the legislature intended them to receive the same salary. Conversely, if two members have the same rank, the one with a longer period of service should receive the greater salary.

Colonel Samuel S. Smith

The law favors constructions which harmonize with reason, and which tend to avoid unjust, absurd, unreasonable or confiscatory results, or oppression. State ex rel. Stern Bros. and Co. v. Stilley, 337 S.W.2d 934 (Mo. 1960). We therefore conclude that when a patrol member's annual salary is increased, it is proper for the highway patrol to recompute all previous longevity increases on the basis of the increase in salary.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH  
ATTORNEY GENERAL

November 21, 1973

OPINION LETTER NO. 236

Honorable Ralph L. Martin  
Prosecuting Attorney  
Jackson County Courthouse  
415 East 12th Street  
Kansas City, Missouri 64106

Dear Mr. Martin:

This letter is in response to your request for this office's opinion on whether Section 556.140, RSMo 1969, applies to robbery in the first degree.

Section 556.140, RSMo 1969, reads as follows:

"If any person shall be convicted of committing a felony, or attempting to commit a felony, while armed with a pistol or any deadly weapon the punishment elsewhere prescribed for said offense in the statutes and laws of the state of Missouri for the felony of which he is convicted shall be increased by the trial judge by imprisonment in the state penitentiary for two years. Upon a second conviction for a felony so committed such period of imprisonment shall be increased by ten years; and upon a third conviction for a felony so committed such period of imprisonment shall be increased by fifteen years. Upon a fourth or subsequent conviction for a felony so committed the person so convicted shall be imprisoned for life."

In State v. Harris, 87 S.W.2d 1026 (Mo. 1935), the Missouri Supreme Court specifically considered this question. There, Harris



Honorable Ralph L. Martin

was charged and convicted with robbery in the first degree by means of a dangerous and deadly weapon. The jury returned a verdict assessing punishment at the state penitentiary for a period of ten years. The trial court imposed a twelve year sentence pursuant to the authority conferred by Section 556.140, RSMo (then Section 4428, R.S. 1929). The Supreme Court in reducing the sentence to ten years held that this section was not applicable to this particular felony noting that robbery in the first degree included the use of a dangerous and deadly weapon as an element of the felony.. In State v. Carter, 443 S.W.2d 176 (Mo. 1969), the court followed the rationale of the Harris opinion.

It is our view that the holding of the Missouri Supreme Court in State v. Harris is controlling unless and until modified by the court or the legislature.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

ELECTIONS:  
REGISTRATION:

The provisions of Section 51.310  
(House Bill No. 667, 77th General  
Assembly), which provide for addi-

tional compensation to certain county clerks for performance of  
duties under Section 51.121 (House Bill No. 667, 77th General As-  
sembly), constitute an increase in compensation to county clerks  
of counties in which the county clerk was required to perform the  
duties under Section 51.121, RSMo 1969, before September 28, 1971,  
and is not effective during such clerks' present terms of office  
but is effective as to clerks coming under the provisions of Sec-  
tion 51.121 after September 28, 1971. Such payments may be made  
for 1974 and thereafter to clerks in counties in which registration  
is first required under House Bill No. 20, 77th General Assembly.

OPINION NO. 238

November 8, 1973



Honorable James C. Kirkpatrick  
Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

This is in response to your request for an opinion from this  
office which reads in part as follows:

"... will Section 51.120 RSMo 1969 apply to  
the 76 counties upon which registration is  
being imposed by virtue of HCSHB 20 [77th Gen-  
eral Assembly], or will it only apply to the  
seven counties of Adair, Audrain, Buchanan,  
Butler, Marion, Newton, Randolph, and Vernon,  
which currently have voter registration in at  
least one city within the county by reason of  
the requirements of Section 116, RSMo 1969?

"Do the provisions of Section 51.121 imposing  
requirements upon the county clerk of a county  
'adopting' the provisions of Chapter 114 apply  
in a situation where, as is the case with the  
passage of HCSHB 20, registration is mandatorily  
imposed by the General Assembly?

"The first regular session of the 77th General  
Assembly has adopted HCSHB 20, which provides

Honorable James C. Kirkpatrick

for the registration of voters throughout the State of Missouri. It imposes registration on 76 Missouri counties which presently do not have county-wide registration (although several of them have registration in the largest city in the county under Section 116, RSMo 1969.)

"Many county clerks have inquired of this office regarding the applicability of Section 51.120 RSMo 1969 to their county, and the applicability of Section 51.310 RSMo (1971 Supp.) to themselves, insofar as it appears to provide a salary increase for the clerks.

"Your opinion of February 2, 1972 (#41 to Seier) held that the salary increase is not effective during the current officers' terms, insofar as it violates Section 13 of Article VII of the Missouri Constitution. Your opinion of March 27, 1972 (#66 to Volkmer) held that, when the pay increase did become effective, it would apply only to those counties which came within the purview of both Chapter 114 and 116 of the Revised Statutes of Missouri. It is the latter opinion which is causing concern."

We assume you refer to Section 51.121 (as amended by House Bill No. 667, 77th General Assembly) in your opinion request instead of Section 51.120, RSMo, due to the fact that Section 51.120 is not relevant to the matter in issue.

You also refer to Opinion No. 66 issued by this office on March 27, 1972, to Harold Volkmer. In that opinion we ruled that Section 51.121, RSMo 1969, applied only to counties which had adopted voter registration under both Chapters 114 and 116, RSMo 1969.

House Bill No. 667 passed by the 77th General Assembly effective September 28, 1973, repealed Section 51.121 and Section 51.310, RSMo Supp. 1971, and enacted among other sections, Section 51.121 and Section 51.310. Section 51.121, as reenacted, reads as follows:

"If any county of the first class not having a charter form of government, or any county of the second, third or fourth class, has adopted the provisions of chapters 114 and 116, RSMo, the county clerk shall annually, on or before

Honorable James C. Kirkpatrick

May tenth, inspect all voting precincts in the county, review the described boundary lines, and survey the number of voters in each precinct measured by the vote at the last preceding presidential election, and within thirty days after the conclusion of such inspection, present a signed report to the county court and the county chairman of the two political parties receiving the largest number of votes in the last presidential election, detailing changes, alterations, and additions which appear to be necessary for the convenience of the voters."

Section 51.310, reads as follows:

"For the performance of the duties imposed by section 51.121 the county clerk shall receive, in addition to all other compensation provided by law, fifteen hundred dollars per annum, except that this section shall not apply to counties of the first class not having a charter form of government."

Section 51.121, as first enacted in substantially the same form in 1969, became effective October 13, 1969, and has been in effect since that time. Laws of Missouri 1969, page 105. It provided for additional compensation to the county clerks in second, third, and fourth class counties which had adopted the provisions of Chapters 114 and 116, RSMo, in the sum of \$1,500 per year. However, the provision for extra compensation was by the terms of such statute terminated on December 31, 1970.

In Opinion No. 409 issued by this office on October 9, 1969, to Haskell Holman, we ruled that the extra compensation of county clerks could be paid for services performed for the year 1970, but not thereafter in view of the fact that the effective date of termination of the provisions for increased compensation was December 31, 1970, under provisions of Senate Bill No. 13, 75th General Assembly.

The present county clerks were elected in 1970 for a term of four years. You inquire whether county clerks are entitled to this additional compensation under the provisions of House Bill No. 667 enacted by the 77th General Assembly.

In 1971 the General Assembly enacted Section 51.310 (House Bill No. 484), which became effective September 28, 1971, providing for the county clerks to receive an additional compensation of

Honorable James C. Kirkpatrick

\$1,500 for the duties imposed by Section 51.121 except such additional compensation was limited to \$500 in counties described in Section 51.295. Section 51.295 (now repealed) applied only to Platte County.

It thus appears that from January 1, 1971 to September 28, 1971, when House Bill No. 484 became effective, there was no provision for any county clerks to receive additional compensation for the performance of the duties under Section 51.121.

This office held in Opinion No. 41, 1972, that county clerks in counties which had adopted the provisions of Chapters 114 and 116 prior to the 1970 election of such clerks were not entitled to the compensation provided in Section 51.310 during the term of office beginning in 1971 because of the constitutional prohibition against an increase in compensation during an officer's term of office. (Section 13, Article VII, Constitution of Missouri)

Section 51.121, as enacted in 1969 and as reenacted in 1971, was interpreted by this office in Opinion No. 66, 1972, to be applicable only to counties coming within the provisions of Chapters 114 and 116. House Bill No. 20, 77th General Assembly, repealed the provisions of Chapters 114 and 116 and enacted in lieu thereof provisions for voter registration except in cities and counties having a board of election commissioners. Section 51.121 was amended by the same session of the legislature (House Bill No. 667, 77th General Assembly). Therefore, despite the repeal of Chapters 114 and 116, it is our view that the provisions of House Bill No. 20 must be read together with the provisions of House Bill No. 667. This means then that clerks in counties not having a board of election commissioners (excluded under House Bill No. 20) and in counties other than those of the first class having a charter form of government (excluded under House Bill No. 667) came within the purview of Section 51.121 as of September 28, 1973. It is, therefore, our view that the county clerks in counties except first class charter counties and counties which have boards of election commissioners are obliged to perform the duties set out in Section 51.121 and are entitled to the compensation provided for in Section 51.310 for the performance of the duties set out in Section 51.121. However, the county clerks in counties in which Chapters 114 and 116 were adopted prior to September 28, 1971, the effective date of Section 51.310, RSMo Supp. 1971, cannot be paid under the provisions of Section 51.310 because of the provisions of Section 13, Article VII of the Constitution of Missouri prohibiting an increase in compensation during the term of office.

It is our view that the fact House Bill No. 667 repealed Section 51.121, RSMo 1969, and Section 51.310, RSMo Supp. 1971, and reenacted two new sections in substantially the same form does not

Honorable James C. Kirkpatrick

make the provision providing for the additional compensation effective during the terms of office of county clerks in counties in which Chapters 114 and 116 were in effect prior to their election to such offices. In State v. Ward, 40 S.W.2d 1074 (Mo. 1931) in discussing the effect of the repeal of a statute and enacting in lieu thereof at the same term a new statute in substantially the same terms, the court stated, l.c. 1078:

"III. The point that the repeal by the Fifty-fifth General Assembly in 1929 of section 5596, R. S. 1919, and the enactment in lieu thereof of a new section to be known as section 5596 [Laws 1929 p. 217 (now Rev. St. 1929 § 8246)], terminated the two year closed season voted by Harrison county in 1928, is without merit.

"In Brown v. Marshall, 241 Mo. 707, 145 S. W. 810, loc. cit. 815, this court ruled: 'A subsequent act of the Legislature repealing and re-enacting, at the same time, a pre-existing statute, is but a continuation of the latter, and the law dates from the passage of the first statute and not the latter. State ex rel. v. Mason, 153 Mo. 23, loc. cit. 58-59, 54 S. W. 524; State ex rel. v. County Court 53 Mo. 128, loc. cit. 129-130; Smith v. People, 47 N. Y. 330.'

"And this is true even though the new section 8246 of Rev. St. 1929 contained modifications of the repealed sections. State v. Bradford, 314 Mo. 684, 285 S. W. 496."

In applying the above principles of law and statutory construction to the present facts, it is our view that the provisions in House Bill No. 667 providing for the repeal of Section 51.121, RSMo 1969, and reenacting the same in substantially the same terms is but a continuation of the provisions of Section 51.121, RSMo 1969, regarding the duties of the county clerks in counties in which Chapters 114 and 116 were in effect prior to their present terms of office and therefore do not create or add additional duties, and therefore the provisions of House Bill No. 667 providing for additional compensation for the performance of such duties do not apply to the county clerks of such counties. To hold otherwise would mean the legislature could, by statute, repeal all or part of the duties of a public officer which existed when he assumed office and by reenactment create the same duties with additional compensation and thus



Honorable James C. Kirkpatrick

defeat the constitutional provision prohibiting the increase of compensation during the term of office of a public official.

As heretofore stated, the duties of the county clerk under Section 51.121, RSMo, applied only to the county clerks in counties which adopted voter registration under Chapters 114 and 116, RSMo. House Bill No. 20, which became effective September 28, 1973, provides for voter registration in all counties not having a board of election commissioners, so Section 51.121, as repealed and reenacted under House Bill No. 667, will apply to all counties which come under the provisions of House Bill No. 20 including those counties which had not adopted voter registration under Chapters 114 and 116, RSMo.

Those clerks in counties which adopted Chapters 114 and 116 prior to September 28, 1971, the effective date of House Bill No. 484, 76th General Assembly, which provided compensation for duties required under Section 51.121, must perform such duties without compensation until the end of their terms. This is obvious because the duties were imposed on such clerks before there was any provision authorizing compensation and, as to such clerks, any provision authorizing compensation for duties already required to be performed constitutes an increase in compensation within the Constitution's prohibition. The same is not true of counties in which the county clerk was first required to register voters under Chapters 114 and 116, RSMo, after September 28, 1971. Such clerks did not have the duties imposed on their offices by Section 51.121 until after the law providing for payment for such duties became effective and, therefore, there is no unconstitutional increase in compensation as to them and they will be entitled to the compensation provided in Section 51.310. Further, clerks in counties which were not under the provisions of Section 51.121, RSMo, prior to September 28, 1973, and which are registering voters for the first time under House Bill No. 20, 77th General Assembly, are required to perform the duties under Section 51.121 and will receive the compensation provided under Section 51.310.

Further, such compensation cannot be paid to any county clerks during the year 1973 in counties in which registration is first required under House Bill No. 20 because the duties provided for under Section 51.121 are required to be performed on or before May 10 of each year and the county clerks of counties which for the first time required registration under provisions of House Bill No. 20, 77th General Assembly, were not on or before May 10, 1973, counties within the purview of Section 51.121.

#### CONCLUSION

It is therefore the opinion of this office that the provisions of Section 51.310 (House Bill No. 667, 77th General Assembly), which



Honorable James C. Kirkpatrick

provide for additional compensation to certain county clerks for performance of duties under Section 51.121 (House Bill No. 667, 77th General Assembly), constitute an increase in compensation to county clerks of counties in which the county clerk was required to perform the duties under Section 51.121, RSMo 1969, before September 28, 1971, and is not effective during such clerks' present terms of office but is effective as to clerks coming under the provisions of Section 51.121 after September 28, 1971. Such payments may be made for 1974 and thereafter to clerks in counties in which registration is first required under House Bill No. 20, 77th General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

SHERIFFS:  
MAGISTRATES:  
MAGISTRATE CLERKS:  
FINES, PENALTIES & FORFEITURES:

CCSHCS for Senate Bill No.  
100 of the 77th General Assem-  
bly, effective September 28,  
1973, authorizes the clerks  
of the magistrate courts of

certain counties to collect fines, penalties and forfeitures and  
other sums of money accruing to the state by virtue of a magis-  
trate court order but requires the sheriffs of such counties to  
make such collections if the clerks do not do so.

OPINION NO. 239

August 21, 1973



Honorable William Dick Fickle  
Prosecuting Attorney  
Platte County  
612 Third Street  
Platte City, Missouri 64079

Dear Mr. Fickle:

This opinion is in response to your question asking whether  
the clerk of the magistrate court of Platte County or the sher-  
iff of Platte County will have the responsibility for collecting  
fines, penalties, forfeitures and other sums of money accruing  
to the state by virtue of any order, judgment or decree of the  
magistrate court, under the provisions of CCSHCS, Senate Bill  
No. 100 of the 77th General Assembly, effective September 28,  
1973.

The bill to which you refer repeals Section 57.130, RSMo  
1969, and provides in lieu thereof:

"57.130. The sheriffs of the several coun-  
ties shall collect and account for all the  
fines, penalties, forfeitures and other sums  
of money, by whatever name designated, accru-  
ing to the state or any county by virtue of  
any order, judgment or decree of a court of  
record, provided that in magistrate courts  
the clerk of the court, except counties of  
the first class having a charter form of  
government and not containing all or part  
of any city having a population in excess

Honorable William Dick Fickle

of four hundred thousand and except counties of the second class, may collect fines, penalties, forfeitures and other sums of money accruing to the state by virtue of any order, judgment or decree of the magistrate court."  
(Emphasis added)

For the sake of clarity we have underscored the provisions added to Section 57.130.

We note by comparison that Senate Bill No. 100 as introduced and the House Committee Substitute for the bill both provided that in magistrate courts the clerk of the court ". . . shall perform the duties in the same manner as they are now performed by the county sheriff in the collection of fines, penalties, forfeitures and other sums of money accruing to the state by virtue of any order, judgment or decree of the magistrate court." Senate Bill No. 100, as perfected, contained an exception as to counties of the first and second classes and also provided that the clerks "may" collect such money.

In view of the legislative history of the bill and the obvious deliberate use of the mandatory word "shall" in the bill as introduced and the permissive word "may" as finally passed, it is our view that the legislature intended that in the counties in which the clerk of the magistrate court is authorized to collect such sums the clerk is not required to do so and the ultimate responsibility for such collections remains with the sheriffs.

The Missouri cases respecting the construction of the words "may" and "shall" are annotated extensively in V.A.M.S., Section 1.020, Anno., Construction of Statutes, Note 9. The general rule is that the term "may" in a statute, unless the contrary is otherwise indicated therein, is generally held to be permissive, not mandatory. Bloom v. Missouri Board for Architects, Professional Engineers and Land Surveyors, 474 S.W.2d 861 (St.L.Ct.App. 1971).

Finally, we note that the question has been raised from another county as to whether or not the sheriff is entitled to a fee for collecting costs under subsection 6 of Section 57.290, Senate Bill No. 516 of the 76th General Assembly, where the clerk and not the sheriff makes the collections. In our view the sheriff is not entitled to the fee under such circumstances.

#### CONCLUSION

It is the opinion of this office that CCSHCS, Senate Bill No. 100 of the 77th General Assembly, effective September 28, 1973, authorizes the clerks of the magistrate courts of certain

Honorable William Dick Fickle

counties to collect fines, penalties and forfeitures and other sums of money accruing to the state by virtue of a magistrate court order but requires the sheriffs of such counties to make such collections if the clerks do not do so.

The foregoing opinion, which I hereby approve was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a long horizontal stroke at the end.

JOHN C. DANFORTH  
Attorney General

TAXATION (INCOME):  
CONSTITUTIONAL LAW:

The property tax relief act for the elderly (CCSHB Nos. 149, 417, 425, 471 and 47, 77th General Assembly) applies for the entire calendar year of 1973.

OPINION NO. 240

August 24, 1973

Mr. James R. Spradling  
Director of Revenue  
Department of Revenue  
Jefferson State Office Building  
Jefferson City, Missouri 65101



Dear Mr. Spradling:

This opinion is in response to your question asking:

"1. Does a claimant filing for a period ending on or after October 1, 1973 compute his or her credit by utilizing income received as defined in Section 1 (1) of the bill (Conference Committee Substitute for HB 149, HB 417, HB 425, HB 471 and HB 47) [77th General Assembly].

- a. For the entire taxable period,
- b. For the period from October 1, 1973 to the end of the taxable year,  
or
- c. For the proportionate part of the taxable period?

"2. Same question as above with respect to 'rent constituting property taxes accrued,' as defined in Section 1 (4) of the bill.

"3. Same question as above with respect to 'property taxes accrued,' as defined in Section 1 (6) of the bill."

The bill to which you refer grants tax relief to persons sixty-five years of age or over having income as defined therein of seven thousand five hundred dollars or less based on a graduated formula which takes into consideration the amount of real property taxes or rent, as therein defined, which the taxpayer has paid.

Mr. James R. Spradling

The provision of the bill which is pertinent to your inquiry is Section 6, which provides:

"This act shall become effective on October 1, 1973, with respect to the calendar year 1973."

Earlier versions of the bill provided that "[T]his act shall become effective on January 1, 1974, with respect to the calendar year 1974."

Clearly, if the bill had not been so amended in passage it would have applied to the calendar year beginning in 1974. Likewise, if the bill contained no effective date it would have been effective by operation of law on September 28, 1973, under the provisions of Section 1.130, RSMo. However, in the latter case there would have been no literal indication of legislative intent with respect to the calendar year to which such relief would initially apply.

Under Section 2 of the bill, "[T]he credit regarding the property taxes of a calendar year may only be claimed on a return for the calendar year or for a claimant's return for a fiscal year that includes the end of the calendar year." Considering the bill as a whole and the nature of the problems attendant to any attempted proration, it appears that the legislature was thinking in terms of an entire calendar year when it provided in Section 6 that the "act shall become effective on October 1, 1973, with respect to the calendar year 1973."

The definition of "Gross rent", Section 1(5) of the bill, refers to "rental paid solely for the right of occupancy, at arms-length, of a homestead during the calendar year 1973 and later, . . ." (Emphasis added). Likewise the definition of "Property taxes accrued", in Section 1(6) of the bill, refers to taxes "levied on a claimant's homestead in 1973". (Emphasis added). The reference to 1973 in Sections 1(5) and 1(6) of the bill were the result of amendments made during passage to conform with the amended provisions of Section 6 respecting the application of the bill to the calendar year 1973. We conclude in the premises that the legislature referred to "calendar year" in Section 6 as the full or entire calendar year and not a portion thereof and that it was the legislative intent to allow the credit and the income, as defined therein, to be computed on the basis of the full calendar year.

The next obvious question is whether such an application is constitutionally permissible. Section 13 of Article I of the



Mr. James R. Spradling

Constitution of Missouri prohibits the enactment of a retrospective law. Such section provides as follows:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

However, such constitutional provision has no application to the present act because such section has no application to the enactment of a law which impairs the state's rights.

The Supreme Court of Missouri in the case of Graham Paper Co. v. Gehner, 59 S.W.2d 49 (Mo. banc 1933), in commenting on the constitutional provision prohibiting retrospective laws said, l.c. 51:

"In this connection the plaintiff contends that although the amended law of 1927 is retrospective in its operation if construed to cover a period antedating the time it went into effect, yet as it is detrimental to the state only, and not to the taxpayer, there is no valid objection, so far as the state is concerned, to the law being retrospective. The provision of the Constitution inhibiting laws retrospective in their operation is for the protection of the citizen and not the state. The law is stated in 12 C.J. 1087 thus: 'The state may constitutionally pass retrospective laws impairing its own rights, and may impose new liabilities with respect to transactions already past on the state itself or on the governmental subdivisions thereof.' . . ."

In such case the Supreme Court also held that the provisions of Section 51 of Article IV of the 1875 Constitution prohibited the legislature from changing the income tax structure when such a change would in effect release or extinguish a debt due the state. A comparable provision is now found as Section 39(5) of Article III of the Missouri Constitution. However, it is our view that the constitutional provision prohibiting the releasing or extinguishing of an indebtedness, liability or obligation due the state has no application to the present act.

Section 6(a) of Article X of the Missouri Constitution which was adopted at the general election of November 7, 1972, and which



Mr. James R. Spradling

became effective thirty days after adoption under the provisions of Section 2(b) of Article XII of the Constitution, provides:

"The general assembly may provide that a portion of the valuation of real property actually occupied by the owner or owners thereof, who are over the age of sixty-five, as a homestead, be exempted from the payment of taxes thereon, in such amounts and upon such conditions as may be determined by law, or the general assembly may provide for certain tax credits or rebates in lieu of such an exemption, but any such law shall further provide for restitution to the respective political subdivisions of revenues lost by reason of the exemption, and any such law may also provide for comparable financial relief to persons of such ages who are not the owners of homesteads but who occupy rental property as their homes."

The above section is, in effect, an extension of the provisions of Section 38(a) of Article III of the Constitution which prohibits grants to individuals but which allows certain exceptions such as "for old age assistance" and specifically authorizes tax credits or rebates.

Thus in our view, the bill is a welfare measure which utilizes the Income Tax Unit of the Department of Revenue as the operational vehicle for the administration of grants to the elderly persons who come within its provisions.

In view of this specific constitutional authorization we are of the view that it was within the power of the legislature to provide that the bill apply with respect to the entire calendar year 1973.

In reaching these conclusions it must be borne in mind that statutory provisions of a remedial nature are to be liberally interpreted. State to use Houseworth v. Dill, 60 Mo. 433 (1875). The same is true of statutes enacted for a beneficent purpose. Schmitz v. Carr Trombley Mfg. Co., 139 S.W.2d 1064 (St.L.Ct.App. 1940); Garrard v. State Department of Public Health and Welfare, 375 S.W.2d 582 (Spr.Ct.App. 1964).

#### CONCLUSION

It is the opinion of this office that the property tax relief act for the elderly (CCSHB Nos. 149, 417, 425, 471 and

Mr. James R. Spradling

47, 77th General Assembly) applies for the entire calendar year of 1973.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH  
Attorney General

October 11, 1973

OPINION LETTER NO. 241  
Answer by Letter - Bird

Honorable William E. Seay  
State Representative, District 129  
104A West Fourth Street  
Salem, Missouri 65560



Dear Representative Seay:

This letter is in response to your inquiry whether:

"May a person who has been elected City Marshal in a City of the 4th class in the State of Missouri with the Mayor-Council form of government also serve as water and sewer commissioner in a paid capacity?"

It is settled that unless the Constitution, a statute, or the common law proscribes the holding of two public offices by one individual, an individual may hold two offices simultaneously and is entitled to the statutory compensation for each office. U.S. v. Saunders, 120 U.S. 126 (1887); State ex rel. Zevly v. Hackmann, 300 Mo. 59, 254 S.W. 53 (Banc 1923); State ex rel. Koehler v. Bulger, 289 Mo. 441, 233 S.W. 486 (Banc 1921); State ex rel. Walker v. Bus, 135 Mo. 325, 36 S.W. 636 (Banc 1896); Bruce v. St. Louis, 217 S.W.2d 744 (St.L.Ct.App. 1949). Since there is no constitutional or statutory prohibition in Missouri against the same person holding these offices simultaneously, the principal issue posed by your request is whether the office of city marshal of a city of the fourth class is compatible with the office of water and sewer commissioner at common law.

Two offices are intrinsically incompatible at common law when:

(a) one is subordinate to the other;

Honorable William E. Seay

- (b) one has supervisory power over the other;
- (c) one audits the other's accounts; or
- (d) one has power of appointment, or power of removal over the other.

See State ex rel. Klick v. Wittmer, 144 P. 648 (Mont. 1914); Attorney General's Opinion No. 167, O'Brien (April 19, 1963).

We find no provision in the Missouri statutes which may be construed as making the office of city marshal of a city of the fourth class incompatible with the office of city water and sewer commissioner of such city. Accordingly, the question of capability of these two offices turns upon the duties of these respective offices as provided by the ordinances of the city of the fourth class. Since this office does not have a copy of such ordinance, we express no opinion concerning their provisions. However, this office has previously determined that the offices of night marshal of a city of the fourth class and county treasurer are compatible insofar as state law is concerned. See Attorney General's Opinion No. 21, Dawes (March 5, 1956) (copy enclosed).

It is therefore our view that the position of city marshal of a city of the fourth class is compatible with the office of water and sewer commissioner of such city of the fourth class unless proscribed by ordinance and that the same person may hold both offices at the same time and receive the compensation established by law for each office.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 167  
4-19-63, O'Brien

Op. No. 21  
3-5-56, Dawes



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

December 21, 1973

OPINION LETTER NO. 242

Mr. Jack Smith  
Executive Secretary  
Missouri Clean Water Commission  
1014 Madison Street  
Jefferson City, Missouri 65101

Dear Mr. Smith:

This will acknowledge receipt of your request for an opinion inquiring whether Missouri law will meet the requirements of the Federal Water Pollution Control Act Amendments of 1972 for the National Pollution Discharge Elimination System State Permit Program.

In your request you state that the Federal Water Pollution Control Act Amendments of 1972 contain specific provisions describing the program and the authority necessary to implement it in order for a state to receive the grant of authority to operate the permit program from the Administrator of the United States Environmental Protection Agency.

It is the opinion of this office that the laws of the State of Missouri provide adequate authority to carry out the state permit program under the National Pollution Discharge and Elimination System as required by the Federal Water Pollution Control Act Amendments of 1972, and therefore satisfy the provisions of Section 402(b) of that federal legislation.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

July 20, 1973

OPINION LETTER NO. 244  
Answer by letter-Card

Ms. Ann Bowling, Executive Secretary  
Missouri Board of Nursing  
Home Administrators  
904 East High Street  
Jefferson City, Missouri 65101



Dear Ms. Bowling:

This letter is in response to your request for an opinion as to whether Rule III (B) of the Board of Nursing Home Administrators is within the authority of the Board.

Rule III (B) provides:

"Every person seeking to renew a license shall annually complete a minimum of twenty-four (24) points of continuing education which are approved by the Missouri Board of Nursing Home Administrators. The Board may require evidence of attendance."

Section 344.040, RSMo Supp. 1971, which reads as follows, concerns the renewal of licenses for nursing home administrators:

"The license of every person licensed under sections 344.010 to 344.100 shall be renewed annually, except as otherwise provided in sections 344.010 to 344.100. By May first of each year, the board shall mail an application for a renewal license to every person to whom a license was issued or renewed during the current year. The applicants shall fill in the application blank and return it to the board with a renewal fee of twenty-five dollars. Upon receipt of the application and

Ms. Ann Bowling

fee, the board shall verify the accuracy of the application and issue to the applicant a certificate of renewal for the year beginning July first, and expiring the following June thirtieth. Any licensee who fails to renew his license by June thirtieth may be reinstated by the board on payment of the current renewal fee, plus the penalty of the fifty percent of renewal fee. Any person acting as a nursing home administrator during any time period that his license has elapsed is in violation of sections 344.010 to 344.100."

Section 344.070, RSMo Supp. 1971, which concerns the powers and duties of the Missouri Board of Nursing Home Administrators, provides as follows:

"1. The board shall annually elect one of its members as president, another as vice president, another as secretary and another as treasurer. It shall adopt rules and regulations to govern its proceedings. It shall make an annual report to the governor and the general assembly. It shall file and preserve all written applications, petitions, complaints, charges or requests made or presented to it, and all affidavits and other verified documents; shall cause to be kept accurate records and minutes of its proceedings; and shall maintain a register of the names and addresses of all persons holding certificates of registration as nursing home administrators and annual permits. A copy of any entry in the register, or of any records or minutes of the board, certified by the president or secretary of the board under its seal, shall be received in evidence, to all intents and purposes as the original. The board may employ such part- or full-time clerical assistance, purchase such equipment and supplies, employ legal counsel, employ a part- or full-time investigator, and incur travel and other expense, within the limits of their appropriations.

"2. The board shall prepare and furnish application forms for licensing and renewal of license.



Ms. Ann Bowling

"3. The board shall examine, license, and renew the license of duly qualified applicants, and shall conduct hearings upon charges calling for discipline of a licensee. The board shall cause the prosecution of any persons violating the provisions of sections 344.010 to 344.100 and may incur necessary expenses therefor."

The rule and regulation mentioned in your request purports to govern the renewal of licenses by adding a requirement of continuing education. The authority of the Missouri Board of Nursing Home Administrators to promulgate such a rule and regulation must therefore come, if at all, from the above-quoted Section 344.070. The validity of the regulation must be determined in light of the provisions of the general law governing administrative regulations and in light of the statutory section enacted by the legislature for the renewing of nursing home administrator's license.

The limitation on the powers of administrative bodies entrusted with rule-making powers are stated in 73 C.J.S. Public Administrative Bodies §94, pp. 414-415, as follows:

"A public administrative body may make only such rules and regulations as are within the limits of the powers granted to it and within the boundaries established by the standards, limitations, and policies of the statute giving it such power, and it may go no further than to make administrative rules and regulations which fill in the interstices of the dominant enactment. It may make only rules and regulations which effectuate a law already enacted, and it may not make rules and regulations which are inconsistent with the provisions of a statute, particularly the statute it is administering or which created it, or which are in derogation of, or defeat, the purpose of a statute, and it may not, by its rules and regulations, amend, alter, enlarge, or limit the terms of a legislative enactment."

In the case of Bresler v. Tietjen, 424 S.W.2d 65 (Mo. banc 1968), the Supreme Court of Missouri invalidated several rules of the Missouri Board of Optometry stating, l.c. 70:

". . . However, under the guise of its rule-making power the Board cannot enlarge upon the scope and terms of the statute, and it

Ms. Ann Bowling

cannot by rule constitute certain conduct a violation of the statute, which, in the absence of the rule, could not reasonably be so construed. . . ."

In that case the Board of Optometry attempted to prohibit licensed optometrists from associating with any kind of business which advertised prices for prescription eyeglasses.

In the case of State ex rel. Springfield Warehouse & Transfer Co. v. Public Service Commission, 225 S.W.2d 792 (K.C.Ct.App. 1949), the court held that an agency can only enact such rules and regulations which have been authorized by the legislature either directly or by necessary implication. An agency has no power to adopt a rule or follow a practice which results in nullifying the expressed will of the legislature.

A review of the statutes governing the licenses of nursing home administrators gives the Board limited powers to adopt rules and regulations. It only has the power to adopt rules to govern the proceedings of the Board. Rule III (B) is adding a completely additional requirement as a condition precedent for the renewal of a license above and beyond the requirements of Section 344.040. Nowhere in the statutes regulating the Missouri Board of Nursing Home Administrators is there any mention of a concept of continuing education. Contrast this with Section 331.050(2) wherein the legislature specifically placed a requirement of a two-day educational program each year as a condition for the renewal of a chiropractic license.

Therefore, it is the conclusion of this office that Rule III (B), as promulgated by the Missouri Board of Nursing Home Administrators, is null and void and of no force and effect since it is adding an additional requirement for renewal of licenses which cannot be reasonably construed as being authorized by the legislature.

Very truly yours,

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

July 20, 1973

OPINION LETTER NO. 245

Mr. Henry Maddox, Director  
Division of Commerce and  
Industrial Development  
Post Office Box 118  
Jefferson City, Missouri 65101

Dear Mr. Maddox:

This letter is issued in response to your request for an opinion as to whether or not the Planned Industrial Expansion Authority of the City of St. Louis may lawfully issue bonds at an interest rate exceeding six percent but not exceeding eight percent annually.

The Planned Industrial Expansion Authority of St. Louis City exists pursuant to Sections 100.300 to 100.620, RSMo 1969 (Laws 1967, Section 1, Page 172). Section 100.390, RSMo 1969, provides that "An authority shall constitute a public body corporate and politic, exercising public and essential governmental functions . . . ." Section 100.440, RSMo 1969, authorizes an authority to issue bonds at interest rates not exceeding six percent per annum.

This would seem to preclude the issuing of bonds by a Planned Industrial Expansion Authority at interest rates exceeding six percent. However, Section 108.170, sub. 1, RSMo Supp. 1971, which, as amended, became effective December 29, 1970, provides as follows:

"1. Other provisions of law to the contrary notwithstanding, any and all bonds including revenue bonds hereafter issued under any law of this state by any county, city, town, village, school district, educational institution, drainage district, levee district, nursing home district, hospital district, library district, road district, fire protection district, water

Mr. Henry Maddox

supply district, sewer district, housing authority, land clearance for redevelopment authority, special authority created under section 64.920, RSMo, authority created pursuant to the provisions of chapter 238, RSMo, or other municipality, political subdivision or district of this state shall be negotiable and may bear interest at a rate not exceeding six percent per annum, and may be sold, at any sale pursuant to any law applicable thereto, at the best price obtainable, not less than ninety-five percent of the par value thereof, anything in any proceedings heretofore had authorizing such bonds or in any law of this state to the contrary notwithstanding. Such aforementioned bonds may bear interest at a rate not exceeding eight percent per annum if sold at public sale after giving reasonable notice of such sale, at the best price obtainable, not less than ninety-five percent of the par value thereof; provided, that such bonds may be sold to the federal government at private sale at a rate not exceeding eight percent per annum. Industrial development revenue bonds may be sold at private sale and bear interest at a rate not exceeding eight percent per annum if sold pursuant to any law applicable thereto, at the best price obtainable, not less than ninety-five percent of the par value thereof."

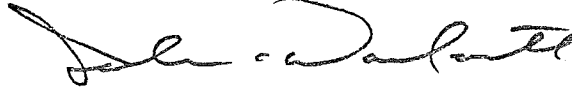
It has already been determined by the Missouri Supreme Court that this particular statute, dealing specifically with interest rates on bonds issued by public bodies, repealed by implication any earlier legislation dealing with interest rates on bonds issued by a particular public body. See Edwards v. St. Louis County, 429 S.W.2d 718 (Mo. banc 1968). The only question remaining is whether the Planned Industrial Expansion Authority of the City of St. Louis falls within the entities mentioned in Section 108.170.

We note that the language of Section 108.170, sub. 1, is very extensive, covering not only specific entities but all municipalities, political subdivisions or districts of the state. The term "municipality" has a broader meaning than city or town. Under Missouri case law, it includes bodies public or essentially governmental in character and function. See St. Louis Housing Authority v. City of St. Louis, 361 Mo. 1170, 239 S.W.2d 289, 294 (banc 1951). In view of the language of Section 100.390, RSMo 1969, it is our opinion that a Planned Industrial Expansion Authority is a "municipality" as that term is used in Section 108.170.

Mr. Henry Maddox

Therefore, the bonds of such an authority may be sold pursuant to Section 108.170, RSMo Supp. 1971, and may bear interest at a rate not exceeding eight percent per annum.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

LIBRARIES:

House Bill 1114 of the 76th General Assembly, Section 182.620, V.A.M.S., provides two alternative methods for the creation of a consolidated public library district. One calls for action by the respective library boards and the county court or the county chief executive officers and the other for an election after a petition of five percent of the registered voters has been submitted. If the first procedure is followed, a district is created and no election under the second procedure may be held to rescind the action creating the district.

OPINION NO. 247

December 20, 1973

Mr. Charles O'Halloran  
State Librarian  
Missouri State Library  
308 East High Street  
Jefferson City, Missouri 65101



Dear Mr. O'Halloran:

This is in response to your request for an opinion on the following question:

"H.B. 1114, passed by the Seventy-Sixth General Assembly, provides in Section 182.620, the procedure for the consolidation of county public library districts. Paragraph one provides for a resolution by the governing boards of the involved county library districts. Paragraphs two, three, four and five provide for an election by the people of the districts on the creation of a consolidated public library district. Paragraph six provides for action following the election or the adoption of the resolution.

"It appears that a consolidated public library district may be formed either by a resolution of the governing boards or by an election and that there are two possible methods to achieve consolidation. My question is, are there two alternative methods or must there be a resolution by the board followed by an election by the people?

Mr. Charles O'Halloran

"A further question would be: Should the governing boards be empowered to form a consolidated public library district by resolution without the necessity of an election, and should the boards do so, may the electors petition for an election on the proposition and should the election be held and the voters disapprove the consolidation, would the action of the board thereby be rescinded?"

You are correct in your observation that House Bill 1114 of the 76th General Assembly (Section 182.620, V.A.M.S.), provides two methods for the creation of a consolidated public library district. The first method (Section 182.620(1), V.A.M.S.), provides that the governing boards of each district to be included in the consolidated district first must approve the consolidation and then apply to the respective county courts or county chief executive officers for their concurrence. If the county courts or county chief executive officers concur then a consolidated public library district is created. The other alternative is set forth in Section 182.620(2-5), V.A.M.S. Section 2 of Section 182.620 provides for a petition of five percent of the qualified electors of each of the constituent districts requesting that an election be held on the question of consolidation. Section 5 of Section 182.620 provides that if a majority of the voters in each county approve the consolidation the districts shall then become consolidated.

If the procedure specified in Section 182.620(1) is followed (which does not call for an election) and a consolidated district is created, the district is in existence and Section 182.620(2-5) providing for an election would not apply. Therefore, the voters could not rescind the consolidation by means of an election under the provisions of Section 182.620(2-5).

#### CONCLUSION

It is the opinion of this office that House Bill 1114 of the 76th General Assembly, Section 182.620, V.A.M.S., provides two alternative methods for the creation of a consolidated public library district. One calls for action by the respective library boards and the county court or the county chief executive officers and the other for an election after a petition of five percent of the registered voters has been submitted. If the first procedure is followed, a district is created and no election under the second procedure may be held to rescind the action creating the district.



Mr. Charles O'Halloran

The foregoing opinion, which I hereby approve, was prepared by my assistant, Charles A. Blackmar.

Very truly yours,

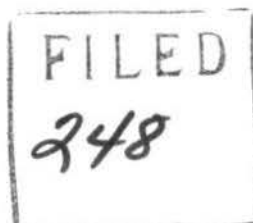
A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH  
Attorney General

August 8, 1973

OPINION LETTER NO. 248

Honorable James I. Spainhower  
Treasurer of the State of Missouri  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Spainhower:

You recently asked this office whether you must comply with Section 6, subsection 1 of House Substitute for House Bill No. 65 of the Seventy-Seventh General Assembly which requires the State Treasurer to establish a special trust fund to be known as the "Transportation Sales Tax Trust Fund." Under the provisions of the above-cited bill, this fund would receive the sales tax proceeds levied for the benefit of the Bi-State Transportation Authority.

The provision in question is substantially identical to similar language used in the City Sales Tax Act enacted by the Seventy-Fifth General Assembly as House Committee Substitute for House Bill No. 243. In Opinion No. 110-1970, this office ruled that to the extent that the legislation imposes duties upon the Treasurer to retain custody of and to disburse non-state funds, the Act is unconstitutional. That opinion also stated that the Director of Revenue of the State of Missouri was responsible for the initial retention and disbursement of the sales tax proceeds collected.

It is the opinion of this office that Opinion No. 110-1970 compels the conclusion that you must disregard the provisions of Section 6, subsection 1 of House Substitute for House Bill No. 65 of the Seventy-Seventh General Assembly insofar as they attempt to require your office to establish a special trust fund for sales tax proceeds collected pursuant to the authority granted by House Substitute for House Bill No. Sixty-Five of the Seventy-Seventh General Assembly.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Encl: Op. 110-1970



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

July 30, 1973

OPINION LETTER NO. 249

Dr. Arthur L. Mallory  
Commissioner of Education  
State Department of Education  
Jefferson State Office Building  
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This is in answer to your request for our review and certification of the State Board of Education's Application for Grant to Strengthen a State Department of Education under the Elementary and Secondary Education Act of 1965, Title V, Part A, Section 503, P.L. 89-10, as amended, for the fiscal year 1974.

It is the opinion of this office that the Missouri State Board of Education is the agency in this state primarily responsible for state supervision of public elementary and secondary schools, and is the "State educational agency" as defined in Section 801(k) of Title VIII of P.L. 89-10, as amended; and that the State Board of Education has the authority under state law to submit an application for a grant pursuant to Title V, Part A, P.L. 89-10. See Sections 161.092 and 178.430, RSMo 1969.

In conjunction with this letter opinion which constitutes our official certification of the application, we have completed the required certification form.

Yours very truly,

A handwritten signature of John C. Danforth is written over a horizontal line. The signature is in cursive and appears to read "John C. Danforth".

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

August 27, 1973

OPINION LETTER NO. 251

Honorable James A. Noland, Jr.  
State Senator, District 33  
Route #1  
Osage Beach, Missouri 65065

Dear Senator Noland:

This opinion is in response to your question asking:

"Other than through the adoption of a municipal zoning plan, does a city of the fourth class have any power or authority to regulate or prohibit the placement of mobile homes within the city limits of the city?"

Such a city does have the power to regulate the construction of buildings under subsection 3, Section 79.450, RSMo Supp. 1971. However, we find no way, other than through the adoption of a zoning plan, for the city to regulate the placement of mobile homes as such.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

ST. LOUIS COURT OF  
CRIMINAL CORRECTIONS:  
BONDS:  
BAIL:

Under Section 479.120, RSMo, the St. Louis Court of Criminal Corrections is in session every day of the week, except Sundays, state and national holidays unless the

court has adjourned. The fact that the judge is not sitting on the bench is not determinative of whether the court is still in session. Only after the judge has officially adjourned the court for the day or for a longer period of time may the clerk of the St. Louis Court of Criminal Corrections set and accept bail as provided for under Section 544.530 (House Bill No. 1160, 76th General Assembly) and Supreme Court Rule 32.01. The clerk must look to the rulings of the court to determine when it has adjourned and thus is no longer "in session."

OPINION NO. 255

August 22, 1973

Honorable Lawrence J. Lee  
State Senator, District 3  
506 Olive Street  
St. Louis, Missouri 63101



Dear Senator Lee:

This opinion is issued in response to your request for a ruling as to when the St. Louis Court of Criminal Corrections is in session to determine when the clerk of the court is empowered under Section 544.530, RSMo, to set and accept bail.

Although your request specifically mentions only Section 544.530, RSMo, we will include a discussion of Supreme Court Rule 32 which relates to the accepting and posting of bonds.

Section 544.530 (House Bill No. 1160, 76th General Assembly) provides:

"When the defendant is in custody or under arrest for an offense for which he may be released as provided in section 544.455 of this act, the court in which the indictment or information is pending may release him and take his bond or recognizance, or, if the court is not in session, the clerk of the court may take his bond or recognizance."

Supreme Court Rule 32.01 provides:

Honorable Lawrence J. Lee

"When a defendant is entitled to bail, the court in which the complaint, indictment or information is pending, or the judge or magistrate thereof, shall admit him to bail, but if the court is not in session, the clerk of the court may admit the defendant to bail."

In Opinion No. 21 issued November 5, 1953, to Davenport (copy enclosed), this office stated that the clerk of the court has a mandatory duty under Section 544.530, RSMo, and Supreme Court Rule 32 to set and accept bail for individuals who have been charged by complaint, indictment or information with a criminal offense when the court is not in session.

In State v. Caldwell, 124 Mo. 509, 28 S.W. 4 (1894), the Missouri Supreme Court stated that a bond or recognizance taken in a criminal case by an unauthorized person is null and void. There the court ruled that the bond taken by the clerk of the court in that case was void since there was no statutory authority existing at the time for his action.

In State v. Eyermann, 172 Mo. 294, 72 S.W. 539 (1903), the Missouri Supreme Court in interpreting Section 2543 of Rev. St. 1899 held that when a defendant is in custody under arrest for a bailable offense, the judge of a court in which the indictment or information is pending can admit the defendant to bail and take his bond or recognizance even when the judge is in chambers and after the court had adjourned for the day.

In State v. Woodson, 179 Mo. 408, 78 S.W. 603 (1904), the Missouri Supreme Court in interpreting Section 2545 Rev. St. 1899 and Section 4160 Rev. St. 1899 held that the purpose of the statute for setting bail was to allow persons who had been charged with a criminal offense to promptly secure their liberty by giving bond. In so holding, the court stated, l.c. 605:

" . . . Take this case. The court adjourned until the 20th of June. After adjournment the defendant was ready to give his bond. Must he wait and be held in custody until the next morning, when the court is in session, before his release can be secured? We think not. . . . This statute is broad enough to empower the judge to admit to bail and take bond in any bailable offense pending in the court of which he is judge at any time when the court is not in actual session. . . . When the court is in

Honorable Lawrence J. Lee

session, no one will dispute that all bonds taken must be entered of record, . . . ."  
(emphasis added)

It is clear that the judge of a court under case law of this state has the authority to set and accept bail in chambers, even after the court has adjourned or recessed. The clerk's authority, however, is limited by Section 544.530, RSMo, and Supreme Court Rule 32.01 to those times when the court is not in session.

Section 479.120, RSMo, which relates to the St. Louis Court of Criminal Corrections states:

"Each division of the court shall be in session every day in the week except Sunday and state and national holidays, unless adjourned by the judge thereof as herein provided. The judge of each division may adjourn his division for a period not to exceed seven days exclusive of Sunday and state and national holidays; and the proceedings in each division shall be conducted in a summary manner. The judges of the court may establish such rules and regulations in relation to continuances as shall be just and proper."

Although we have found no Missouri case setting forth when a court is in session, "session" has been variously defined. Black's Law Dictionary, 4th Edition, states at 1536-1537:

"SESSION. The sitting of a court, Legislature, council, commission, etc., for the transaction of its proper business. Hence, the period of time, within any one day, during which such body is assembled in form, and engaged in the transaction of business, or, in a more extended sense, the whole space of time from its first assembling to its prorogation or adjournment sine die. *Ralls v. Wyand*, 40 Okl. 323, 138 P. 158, 162.

"Session of court is time during term in which court sits for transaction of business, after judge arrives and opens court. *Carpenter v. City of Birmingham*, 221 Ala. 368, 128 So. 899, 900.

Synonyms



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"Strictly speaking, the word 'session,' as applied to a court of justice, is not synonymous with the word 'term.' The 'session' of a court is the time during which it actually sits for the transaction of judicial business, and hence terminates each day with the rising of the court. A 'term' of court is the period fixed by law, usually embracing many days or weeks, during which it shall be open for the transaction of judicial business and during which it may hold sessions from day to day. But this distinction is not always observed, many authorities using the two words interchangeably. *Muse v. Harris*, 122 Okl. 250, 254 P. 72, 73; *State v. City of Victoria*, 97 Kan. 638, 156 P. 705, 708; *Nation v. Savely*, 127 Okl. 117, 260 P. 32, 35."

Ballentine's Law Dictionary, 2nd Edition, states at 1190:

"Session of court . . . the time during which the court is in fact holding court at the place appointed and engaged in business."

In *Carpenter v. City of Birmingham*, 221 Ala. 368, 128 So. 899 (1930), the Alabama Supreme Court stated, l.c. 900:

"'. . . A session of court is the time during a term in which the court sits for the transaction of business, and a court is not in session until the judge arrives and opens court. . . .'"

Thus, it is clear that the legislature in enacting Section 479.120, RSMo, contemplated that the St. Louis Court of Criminal Corrections is to be open every day of the week for the transaction of judicial business unless and until specifically adjourned by the judge thereof except on Sundays and state and national holidays. Furthermore, it is clear that whether the judge is sitting on the bench is not determinative of whether the court is still in session. The judge may be in chambers conducting judicial business or the court may only be in recess for a short period of time during which business is temporarily suspended. Yet, the court is still sitting for the transaction of business. It is the opinion of this office that the court is "in session" from the time the judge has officially convened court in the morning to the time that the judge has officially adjourned court for the day or for a longer period of time as provided for in the statute. Once the judge has officially adjourned court, bail may be set by either the judge of the

Honorable Lawrence J. Lee

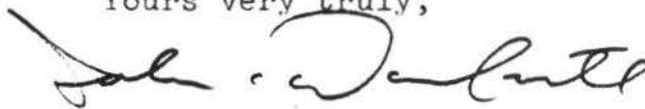
court or by the clerk of the court. Should bail be set by the clerk of the court at any other time, it would be null and void and could not be enforced. State v. Caldwell, supra.

CONCLUSION

It is the conclusion of this office that under Section 479.120, RSMo, the St. Louis Court of Criminal Corrections is in session every day of the week, except Sundays, state and national holidays unless the court has adjourned. The fact that the judge is not sitting on the bench is not determinative of whether the court is still in session. Only after the judge has officially adjourned the court for the day or for a longer period of time may the clerk of the St. Louis Court of Criminal Corrections set and accept bail as provided for under Section 544.530 (House Bill No. 1160, 76th General Assembly) and Supreme Court Rule 32.01. The clerk must look to the rulings of the court to determine when it has adjourned and thus is no longer "in session."

The foregoing opinion, which I hereby approve, was prepared by my assistant, Daniel P. Card II.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 21  
11-5-53, Davenport

December 6, 1973

OPINION LETTER NO. 256  
Answer by letter-Wieler



Honorable William S. Brandom  
Prosecuting Attorney  
Clay County Courthouse  
Liberty, Missouri 64068

Dear Mr. Brandom:

This is in response to a request for an opinion by your assistant, Mr. P. Wayne Kuhlman, as to whether or not the Clay County court can expend funds collected from the special road and bridge tax authorized by Section 137.555 for the improvement and widening of Oak Street within the city of Gladstone and the "Oak villages."

It is our information that Clay County is a county of the second class with a population of 123,000 people. Oak Street enters Clay County from the south as a part of U.S. Highway Alternate 169. At this point, it is entirely within the city of Kansas City. Splitting off from U.S. Highway Alternate 169 while still within the city limits of Kansas City, Oak Street runs straight north paralleling U.S. Highway 169. Leaving the city limits of Kansas City, Oak Street becomes the border street between the cities of Gladstone and the villages of Oaks, Oakwood, Oakwood Park, and Oakview. The respective borders of Gladstone and the "Oak villages" run to the center of the street. North of Oakview, Oak Street becomes a city street within the city of Gladstone. North of Gladstone, Oak Street again becomes a city street within the city of Kansas City at which time it merges into U.S. Highway 169. At no point along the way does the street ever enter into any unincorporated area of the county. The city of Gladstone lies within a special road district, the boundaries of which are coterminous with the city. The district is empowered, with the consent of the city, to expend all of its funds within the city pursuant to Section 233.103, RSMo 1969. The "Oak villages" are not within any special road district.

Honorable William S. Brandom

We have been informed that the county court in Clay County has not established a county urban road system under the provisions of Section 137.557, RSMo 1969, so our discussion will be limited to the provisions of Section 137.555, RSMo 1969, Section 137.556, RSMo 1969, and the limitations placed upon these sections by the provisions of Section 50.550, RSMo 1969, of the County Budget Law.

Section 137.555 provides as follows:

"In addition to other levies authorized by law, the county court in counties not adopting an alternative form of government and the proper administrative body in counties adopting an alternative form of government, in their discretion may levy an additional tax, not exceeding thirty-five cents on each one hundred dollars assessed valuation, all of such tax to be collected and turned into the county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose whatever; provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any special road district shall be paid into the county treasury and four-fifths of such part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose and shall be paid out to such special road district upon warrants of the county court, in favor of the commissioners or treasurer of the district as the case may be; provided further, that the part of said special road and bridge tax arising from and paid upon property not situated in any special road district and the one-fifth part retained in the county treasury may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village."

In our opinion, this section would not authorize the expenditure of any funds derived from the special road and bridge tax by

Honorable William S. Brandom

the county court on Oak Street within the city limits of the city of Gladstone and the "oak villages" for the reason that Oak Street does not form a part of a continuous highway of Clay County leading through these incorporated areas. Enclosed is a former opinion of this office which discusses the term "continuous highway of said county" as it appears in the statute (Opinion No. 62 issued January 10, 1955, to the Honorable Harry J. Mitchell). In that opinion, we held that a street must be a connecting link between two portions of a county highway which together form an uninterrupted line of traffic flowing through a city in order to be considered a continuous highway of the county. Oak Street does not meet this definition. It enters Gladstone and the "Oak villages" from the city of Kansas City and it exits Gladstone to the north into the city of Kansas City. At no time does it enter an unincorporated area of Clay County.

However, the provisions of Section 137.556, RSMo 1969, also apply to this situation. Section 137.556 provides as follows:

"1. Notwithstanding the provisions of section 137.555, any county of the second class which now has or may hereafter have more than one hundred thousand inhabitants shall expend not less than twenty-five percent of the moneys accruing to it from the county's special road and bridge tax levied upon property situated within the limits of any city, town or village within the county for the repair and improvement of existing roads, streets and bridges within the city, town or village from which such moneys accrued.

"2. The city council or other governing body of the city, town or village shall designate the roads, streets and bridges to be repaired and improved and shall specify the kinds and types of materials to be used.

"3. The county court may make and supervise the improvements or the city, town or village, with the consent and approval of the county court, may provide for the repairs and improvement by private contract and, in either case, the county court shall pay the costs thereof out of any funds available under the provisions of this section."

Section 137.555 provides that eighty percent of the special road and bridge tax collected upon property lying within the spe-



Honorable William S. Brandom

cial road district is to be returned to that road district. Section 137.556, sub. 1, requires a second class county containing more than one hundred thousand inhabitants to expend not less than twenty-five percent of the special road and bridge tax collected upon property lying within any city, town or village upon the streets and bridges within said city, town or village, notwithstanding the provisions of Section 137.555. In our opinion, the latter section is controlling. Therefore, not more than seventy-five percent of the tax collected from the property lying within the city of Gladstone and the special road district whose boundaries are coterminous with the city should be turned over to the district under the provisions of Section 137.555. At least twenty-five percent should be expended upon streets within the city of Gladstone pursuant to the provisions of Section 137.556. That part of Oak Street which lies wholly within the city of Gladstone would thus be subject to this provision.

In making these expenditures within the city of Gladstone, the county is prohibited by the provisions of Section 50.550, RSMo 1969, of the County Budget Law, from expending county funds for the repair and upkeep of bridges in any special road district. Section 50.550, in pertinent part, provides:

" . . . The budget shall contain adequate provisions for the expenditures necessary . . . for the repair and upkeep of bridges other than on state highways and not in any special road district, . . . " (Emphasis added)

In Opinion No. 309 issued August 28, 1969, to the Honorable Ralph B. Nevins, we held that this provision would not allow a county court to expend money derived from either the special road and bridge tax levy or the general revenue tax on the repair and upkeep of bridges lying within a special road district (copy of that opinion enclosed).

An additional problem arises as to that portion of Oak Street which forms the boundary between the city of Gladstone and the "Oak villages." Section 137.556 provides that not less than twenty-five percent of the special road and bridge taxes collected from property lying within any city, town or village shall be expended for the improvement and repair of existing roads, streets, and bridges within the city, town or village from which such moneys accrue. In Town of Alexandria v. Clark, 231 S.W.2d 622, 623-624 (Mo. 1950), the Missouri Supreme Court said that the term "within" could have a variety of meanings depending upon the context in which it was used, but that in normal usage the term meant "inside the bounds" or "not without." In the absence of any indication to the contrary, we must conclude that the legislature intended such a meaning here.

Honorable William S. Brandom

Accordingly, the provisions of Section 137.556 cannot apply to that portion of Oak Street which forms the boundary between Gladstone and the "Oak villages" inasmuch as said street does not lie wholly within the territorial limits of any of these municipalities.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 62  
1-10-55, Mitchell

Op. No. 309  
8-28-69, Nevins



RECORDERS:  
DEEDS OF TRUST:

When mortgages or deeds of trust  
have been recorded on microfilm,  
the acknowledgment of satisfaction

or release can be executed only by written release as required by  
Chapter 443, RSMo, and recorded on microfilm as provided in Sec-  
tion 109.120, RSMo.

OPINION NO. 262

September 4, 1973

Honorable Robert O. Snyder  
Representative, District 45  
Mississippi Valley Building  
506 Olive Street  
St. Louis, Missouri 63101

FILED

262

Dear Representative Snyder:

This is in response to your request for an opinion from this  
office as follows:

"See attached Section 443.060 V.A.M.S. Note  
the disjunctive word 'or' in Subsection 1 in  
the statute, indicating that satisfaction of  
a note secured by a deed of trust on real  
estate may be satisfied in either manner pre-  
scribed by the statute.

"See attached Section 109.120 V.A.M.S. Under  
the terms of Subsection 3 of this statute, Re-  
corders of Deeds in many counties of Missouri  
which have adopted microfilm recording of in-  
struments affecting title to real estate have  
required the release of notes secured by deeds  
of trust by deed of release rather than by re-  
recording the original note and deed of trust  
with appropriate acknowledgments of payment,  
satisfaction or release on the margin or else-  
where. The former opinions of your office re-  
ferred to in the annotations do not appear to  
cover this question. . . .

"Please advise whether a Recorder of Deeds in  
a county which has adopted microfilm records  
as a means of recording instruments affecting  
real estate can require the record of payment,

Honorable Robert O. Snyder

satisfaction or release, as the case may be, to be made by a deed of release or similar instrument or may such payment, satisfaction or release be reflected by appropriate notations on the original note and deed of trust.

"An attorney at law residing in the district represented by the undersigned was advised by an out-state Recorder of Deeds that under the terms of Section 109.120, as construed with Section 443.060, a deed of release could be required in order to effectively satisfy of record a paid note secured by a deed of trust."

Section 443.060, RSMo, to which you refer, provides the method for acknowledgment of satisfaction and release of mortgages and deeds of trust. It provides in part as follows:

"1. If any mortgagee, cestui que trust or assignee, or administrator of the mortgagee, cestui que trust or assignee, receive full satisfaction of any mortgage or deed of trust, he shall, at the request and cost of the person making the same, acknowledge satisfaction of the mortgage or deed of trust on the margin of the record thereof, or deliver to such person a sufficient deed of release of the mortgage or deed of trust; but it shall not in any case be necessary for the trustee to join in such acknowledgment of satisfaction or in such deed of release; and provided further, that when any mortgage or deed of trust shall be satisfied by a deed of release, the recorder shall note on the margin of the record of such deed of trust the book and page where such deed of release is recorded. In case satisfaction be acknowledged by the payee or assignee, or in case a full deed of release is offered for record, the note or notes secured shall be produced and canceled in the presence of the recorder, who shall enter that fact on the margin of the record and attest the same with his official signature; and no full deed of release shall be admitted to record unless the note or notes are so produced and canceled, and that fact entered on the margin of the record and attested as above provided."

Honorable Robert O. Snyder

Under the above section if any mortgagee or his representative receive full satisfaction of the mortgage or deed of trust, he shall, at the request and cost of the person making the same, acknowledge satisfaction of the mortgage or deed of trust on the margin of the record thereof, or deliver to the person making the same a sufficient deed of release of the mortgage or deed of trust. Under this section, the payee or assignee may acknowledge satisfaction on the margin of the record, or deliver to the person making the same a deed of release.

Section 109.120, RSMo, provides as follows:

"3. When any recorder of deeds in this state is required or authorized by law to record, copy, file, recopy, replace or index any document, plat, map or written instrument, he may do so by photostatic, photographic, microphotographic, microfilm, or similar mechanical process which produces a clear, accurate and permanent copy of the original. The reproductions so made may be used as permanent record of the original. When microfilm or a similar reproduction is used as a permanent record by recorder of deeds, duplicate reproductions of all recorded documents, indexes and files required by law to be kept by him shall be made and one copy of each document shall be stored in a fireproof vault and the other copy shall be readily available in his office together with suitable equipment for viewing the filmed record by projection to a size not smaller than the original and for reproducing copies of the recorded or filmed documents for any person entitled thereto. In all cases where instruments are recorded under the provisions of this section by microfilm, any release, assignment or other instrument, affecting a previously recorded instrument by microfilm may not be made by marginal entry but shall be filed and recorded as a separate instrument and shall be in a separate book, cross-indexed to the document which it affects." (emphasis added)

You inquire whether a recorder of deeds in a county which has adopted microfilm records as a means of recording instruments affecting real estate can require the record of payment, satisfaction or release, as the case may be, to be made by deed of release or similar instrument or may such payment, satisfaction or release be reflected by appropriate notations on the original note and deed of trust.

Honorable Robert O. Snyder

We assume, as a matter of fact, it is impossible for acknowledgment of satisfaction as required under Section 443.060, supra, to be made on the margin of the record when the instrument has been recorded on microfilm.

Under Section 109.120, supra, the recorder of deeds is authorized by law to record any document, plat, map or written instruments by photostatic, photographic, microphotographic, microfilm or similar mechanical process which reduces a clear, accurate and permanent copy of the original. It further provides that in all cases where instruments are recorded under the provisions of this section by microfilm, any release, assignment or other instrument affecting a previously recorded instrument by microfilm may not be made by marginal entry but shall be filed and recorded as a separate instrument and shall be in a separate book, cross-indexed to the document to which it refers.

It is our opinion that acknowledgment of satisfaction or release or partial release of a mortgage or deed of trust which has been recorded on microfilm has to be by a release in writing as required by Chapter 443, RSMo, governing the execution and releases of mortgages or deeds of trust, and the release must be recorded on microfilm as provided for under Section 109.120, supra. It is our opinion that appropriate notations on the original note or deed of trust showing satisfaction and release does not constitute a release under Section 109.120 and recording on microfilm the promissory note marked paid and the mortgage or deed of trust marked satisfied does not satisfy of record the mortgage or deed of trust.

#### CONCLUSION

It is the opinion of this office that when mortgages or deeds of trust have been recorded on microfilm, the acknowledgment of satisfaction or release can be executed only by written release as required by Chapter 443, RSMo, and recorded on microfilm as provided in Section 109.120, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

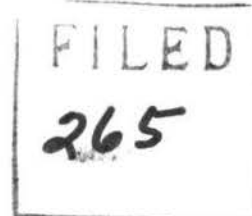
ELECTIONS:  
REGISTRATION:  
COUNTY CLERKS:

Persons who are legally registered to vote under the provisions of Chapters 114 and 116, RSMo, on September 28, 1973, are not required to re-register under House Bill No. 20, 77th General Assembly.

OPINION NO. 265

August 30, 1973

Honorable Charles LeCompte  
Prosecuting Attorney  
Greene County Courthouse  
Springfield, Missouri 65802



Dear Mr. LeCompte:

This is in response to your request for an opinion from this office as follows:

"A question has arisen concerning the intent of the Senate Substitute for House Committee Substitute for House Bills Nos. 20, 71, 94 and 97 which repeal Section 114 and 116 of the Missouri Revised Statutes with the exception of 114.100, 114.210 and 116.130. Governor Bond has signed these Bills and they will become effective September 28, 1973.

"Due to the wording of the Act it has become essential that an opinion be requested as to whether or not the registration process in effect under Local Option County Registration (Chapter 114 RSMo) is in compliance with this Act. This is essential because some information necessary to register to vote required by the substitute of Chapter 114 was not required under Local Option County Registration and there seems to be no definite section of the aforementioned Act which validates prior registration in counties without a Board of Election Commissioners

"In conversations between County Clerk, Roy D. Blunt, and the Attorney General's office, it has become apparent that Greene County and other counties who have had registration in



Honorable Charles LeCompte

the past, but have not had a Board of Election Commissioners, need an opinion concerning its status under the replacement for the major portion of Section 114, Missouri Revised Statutes in order to determine whether or not registration completed prior to September 28, 1973 under present Chapter 114, Missouri Revised Statutes will be valid on September 28, 1973."

Senate Substitute for House Committee Substitute for House Bills Nos. 20, 71, 94 and 97, 77th General Assembly, hereinafter referred to as House Bill No. 20, repeals all of the provisions of Chapters 114 and 116, RSMo, and enacts twenty-seven new sections.

Chapter 114, RSMo, which was repealed effective September 28, 1973, provides for voter registration in counties which adopted its provisions by a vote of the people. It does not apply to a city in the county which has 10,000 or more inhabitants or a county with more than 200,000 inhabitants or a county containing a city or part of a city of more than 400,000 inhabitants.

Chapter 116, RSMo, repealed effective September 28, 1973, provides for registration of voters in cities of 10,000 and over and in cities of 7,000 or more with voter approval in counties of class two, three, and four.

Under these provisions, some counties in this state have adopted voter registration under provisions of Chapter 114, RSMo, and some cities in this state have or have adopted voter registration under Chapter 116, RSMo. However, there are certain cities and certain counties in the state which do not have voter registration under these chapters.

Chapter 117, RSMo, provides for voter registration in cities of 300,000 to 700,000 inhabitants. A board of election commissioners is provided for under this chapter so House Bill No. 20 does not apply to these cities.

Chapter 118, RSMo, provides for registration of voters in cities of over 600,000 inhabitants. It provides for a board of election commissioners so House Bill No. 20 does not apply to such cities.

Chapter 119, RSMo, provides for voter registration in certain counties containing a city of over 400,000. A board of election commissioners is provided for under this chapter so House Bill No. 20 does not apply to such a county.

Honorable Charles LeCompte

Chapter 113, RSMo, provides for registration of voters in class one counties. It also provides for a board of election commissioners so House Bill No. 20 does not apply to counties included in the provisions of this chapter.

Section A of House Bill No. 20 expressly repeals by section number all sections of Chapters 114 and 116, RSMo. Section 1 of this act provides that it shall apply in all elections except those in cities and counties having a board of election commissioners.

It further provides as follows:

"Section 2. 1. No person shall be permitted to vote in any election unless he is duly registered and unless his name thereby appears in both the county record and the precinct record for the county and precinct in which he resides.

"2. The registration of voters shall be held as provided in this act. After registering, a voter is not required to register again, except as provided in this act. The registration of voters may be changed, canceled or transferred only as provided in this act.

"Section 3. The county clerk is ex officio the registration officer of the county and shall control the registration of voters in the county."

Under these above-quoted statutory provisions, the registration of voters shall be held as provided in House Bill No. 20 and no person shall be permitted to vote in an election unless he is duly registered.

You inquire whether a person who is duly registered to vote under Chapter 114 or 116, RSMo, will be required to re-register under House Bill No. 20.

As heretofore stated, House Bill No. 20 expressly repeals by section number all sections in Chapters 114 and 116, RSMo. It enacts twenty-seven new sections with different numerical numbers. It does not contain a savings clause providing for prior registration of voters under Chapters 114 and 116 to be considered as registered under House Bill No. 20. Your question is what is the status of those persons who were registered voters under Chapters 114 and 116, RSMo, after all the provisions of these chapters are repealed.



Honorable Charles LeCompte

The general rule of statutory construction of a statute which expressly repeals an existing law is stated in 82 C.J.S. Statutes §282 as follows:

"An express repeal is the abrogation or annulment of a previously existing law by the enactment of a subsequent statute which declares that the former law shall be revoked and abrogated. A statute, or portion thereof, may be repealed directly by an express provision or declaration in a subsequent statute, provided the repealing statute conforms to the procedure prescribed by the constitution of the state. However, an express repeal has no more force and effect than an implied repeal. As discussed *infra* § 386, a statute purporting to repeal other statutes is subject to the same rules of interpretation as other enactments, and the legislative intent will prevail over a literal interpretation. Even words of absolute repeal may be qualified by the intention manifested in other parts of the same act; and, according to some authorities, an express declaration that a particular statute is repealed will not be given effect, where it is apparent that the legislature did not so intend; but, according to other authorities, where a statute is specifically repealed, a court will not inquire whether the legislature intended its repeal."

Under the above rule of statutory construction, a statute which expressly repeals an existing law is to be construed in the same manner as any other statute and the intent of the legislature will prevail over the literal interpretation.

The basic rule of statutory construction is to seek legislative intention and effectuate it if possible, and the law favors constructions which harmonize with reason and which tend to avoid unjust, absurd, unreasonable, and confiscatory results or oppression. State ex rel. Stern Brothers & Co. v. Stilley, 337 S.W.2d 934 (Mo. 1960).

As heretofore stated, House Bill No. 20 expressly repeals each and every section of Chapters 114 and 116, RSMo, and reenacts twenty-seven new sections which constitute a code within itself providing for voter registration in all counties including cities except those counties and cities that have a board of election commissioners.

Honorable Charles LeCompte

Section 2 of House Bill No. 20 provides in part that no person shall be permitted to vote unless he is duly registered and that registration of voters shall be held as provided in such bill, and after registering, a voter is not required to re-register except as provided in such bill and the county clerk is ex officio the registration officer. This is substantially the same as the provisions contained in Chapters 114 and 116, RSMo, which were repealed. The question is whether those persons who have duly registered under Chapters 114 and 116, RSMo, will have to re-register under the provisions of House Bill No. 20.

In State v. Ward, 40 S.W.2d 1074 (Mo. 1931), the defendant was charged with violating the wild game law of Harrison County. On November 6, 1928, Harrison County by a vote of the people adopted a proposition for a closed season on quail for two years under authority of Section 5596, RSMo 1919. The 55th General Assembly passed an act, approved June 5, 1929 (Laws of Missouri 1929, page 217) repealing Section 5596, RSMo 1919, and enacted a new section pertaining to the same subject to be known as Section 5596. The section as reenacted in 1929 omitted deer contained in the old section, decreased the number of turkeys which any one person might kill, and decreased the number of turkeys which any person could kill in a calendar year. It contained a new proviso making it unlawful to kill turkey at any time within the confines of any state park. Section 5596 as reenacted was the same in all other respects including the local option proviso found in the repealed section.

The defendant contended that the repeal of Section 5596, RSMo 1919, and the enactment of a new section terminated the closed season voted by Harrison County. In discussing this question, the court stated, l.c. 1078:

"The point that the repeal by the Fifty-fifth General Assembly in 1929 of section 5596, R. S. 1919, and the enactment in lieu thereof of a new section to be known as section 5596 [Laws 1929 p. 217 (now Rev. St. 1929 § 8246)], terminated the two year closed season voted by Harrison county in 1928, is without merit.

"In Brown v. Marshall, 241 Mo. 707, 145 S. W. 810, loc. cit. 815, this court ruled: 'A subsequent act of the Legislature repealing and re-enacting, at the same time, a pre-existing statute, is but a continuation of the latter, and the law dates from the passage of the first statute and not the latter. State ex rel. v. Mason, 153 Mo. 23, loc. cit. 58-59, 54 S. W. 524; State ex rel. v. County Court,

Honorable Charles LeCompte

53 Mo. 128, loc. cit. 129-130; Smith v. People,  
47 N. Y. 330.'

"And this is true even though the new section 8246 of Rev. St. 1929 contained modifications of the repealed sections. State v. Bradford, 314 Mo. 684, 285 S. W. 496."

Applying the above principles of law and statutory construction to the present facts, it is our view that the provision of House Bill No. 20 providing for the repeal of Chapters 114 and 116, RSMo, and reenacting a voter registration bill requiring all voters in all counties and cities not having a board of election commissioners to register does not terminate the registration of those persons previously registered but is a continuation of such registration under the new law, House Bill No. 20. It is our view that the legislature did not intend, when it repealed Chapters 114 and 116, RSMo, and enacted at the same time a new act providing for county-wide registration of voters except in counties and cities with election boards, to nullify the prior registration and require those previously registered to re-register.

Section 22 of House Bill No. 20 provides as follows:

"The county court shall pay the expenses of registration incurred under the provisions of this act; and within one year immediately following the effective date of this act, the state shall pay to each county not having voter registration on the effective date of this act and in which registration of voters is required by the provisions of this act, in order to defray the initial costs of registration in such counties, a sum equal to one dollar times the number of votes cast for governor in the county during the next preceding gubernatorial election; provided however, that the number of votes cast in cities having voter registration in counties not having voter registration shall not be used in calculating the amounts due to counties not having voter registration."  
(emphasis added)

The emphasized portions of Section 22 clearly show that the legislative intent is that House Bill No. 20 does not require persons to re-register who were registered under Chapters 114 and 116, RSMo.

Honorable Charles LeCompte

CONCLUSION

It is the opinion of this office that persons who are legally registered to vote under the provisions of Chapters 114 and 116, RSMo, on September 28, 1973, are not required to re-register under House Bill No. 20, 77th General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

August 22, 1973

OPINION LETTER NO. 269  
Answer by Letter - Klaffenbach

Honorable Robert O. Snyder  
State Representative, 95th District  
506 Olive Street, Suite 605  
St. Louis, Missouri 63101

Dear Representative Snyder:

This letter is in response to your request for a ruling on the following questions relating to House Bill No. 1156 of the 76th General Assembly:

"1. Section 3 of the act relates to a petition to a City Council which must be signed by a majority of the owners of the real property within the proposed district. Does this section include both resident and nonresident owners? Does an owner sign only once regardless of how much property he owns within the district or does he sign for each parcel of property he may own?

"2. Section 7 of the Act provides for an election relating to the incurring of indebtedness and the issuing of bonds or notes. Are the qualified electors specified in this section the residents of the district who are duly registered and qualified to vote? Or are the owners of property within the district, regardless of their residence, intended to be qualified electors?

"3. Is the governing body of the city also the governing body of the special business district for purposes of the act and particularly for the purposes of Sections 7 and

Honorable Robert O. Snyder

8 relating to the issuance of general obligation bonds, revenue bonds and refunding bonds?

"4. It would be helpful for cities which contemplate acting under this legislation if the Attorney General would issue some general guide lines in connection with its implementation."

Section 3 of the bill provides in part:

"A special business district may be established, enlarged or decreased in area as provided herein in the following manner:

"Upon petition which shall recite the proposed maximum tax rate signed by a majority of the owners of the real property on which is paid the ad valorem real property taxes within the proposed district, the governing body of the city may adopt a resolution of intention to establish, enlarge or decrease in area a special business district. The resolution shall contain the following information:

(a) Description of the boundaries of the proposed area;

(b) The time and place of a hearing to be held by the governing body considering establishment of the district;

(c) The proposed uses to which the additional revenue shall be put and the initial tax rate to be levied.

"Whenever a hearing is held as provided hereunder the governing body of the city shall publish notice of said hearing on two separate occasions in at least one newspaper of general circulation not more than fifteen (15) days nor less than ten (10) days before said hearing; and shall mail a notice by registered or certified United States mail with a return receipt attached of said hearing to all owners of record of real property and licensed businesses located in the proposed district; and



Honorable Robert O. Snyder

shall hear all protests and receive evidence for or against the proposed action; rule upon all protests which determination shall be final; and continue the hearing from time to time." (Emphasis added)

Section 3 does not require residency and does not refer to the extent of land owned by such owners. Compare Sections 249.450, RSMo, 249.010 (Laws of 1972), 249.763, RSMo, respecting certain sewer districts; Section 233.175, RSMo, respecting certain road districts; and Section 235.030, RSMo, respecting certain street light maintenance districts. Clearly, if the legislature had intended to impose restrictions with regard to acreage or residency it could have done so as it has in other statutes. Likewise, it appears obvious that a large proportion of owners in a business district would be nonresident owners.

We thus conclude in answer to your first question that such owners do not have to be residents and that the terminology "a majority of the owners of real property on which is paid the ad valorem real property taxes within the proposed district" means simply a majority of such owners without regard to the extent of acreage or part thereof owned. In addition, since the legislature did not define the word owner to include a leasehold interest (compare Section 249.760, RSMo, with respect to certain sewer districts), we conclude that "owner" refers to the owner of the fee.

In answer to your second question concerning Section 7, it is our view that the terminology "upon a vote of two-thirds of the qualified electors of the district voting thereon" means precisely what it says. Only those eligible to vote, which necessarily excludes nonresidents of the district, may vote and it is necessary to have two-thirds of such votes in order to incur such indebtedness.

Your third question asks whether the governing body of the city is also the governing body of the special business district for purposes of the act and particularly for the purposes of Sections 7 and 8, relating to the issuance of general obligation bonds, revenue bonds and refunding bonds. Our view is that the governing body of the city is also the governing body of such district. This seems clear from the terminology employed by the legislature in Sections 1, 2, 3, 4, 5, 6, 9 and 10, with respect to the functions and duties of the "governing body" of the city. No provision is found authorizing any other entity to govern the district.



Honorable Robert O. Snyder

Finally, in answer to your fourth paragraph requesting guidelines for the implementation of the act, we regret that we can issue opinions only on specific questions.

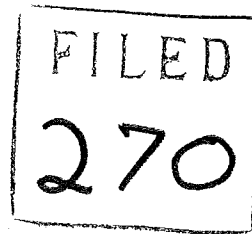
Very truly yours,

JOHN C. DANFORTH  
Attorney General

September 20, 1973

OPINION LETTER NO. 270  
Answer by Letter - Klaffenbach

Honorable James A. Noland, Jr.  
Missouri Senate, District 33  
Rural Route 1  
Osage Beach, Missouri 65065



Dear Senator Noland:

This letter is in response to your opinion request asking when the limitation on compensation for ex officio collectors under House Bill No. 265, 77th General Assembly, becomes effective and what effect it has on the compensation of ex officio collectors.

The bill to which you refer amended Section 52.270, RSMo 1969, which imposed limitations on the compensation of such ex officio collectors by deleting the reference to ex officio collectors in such section thus making Section 52.270 not applicable to ex officio collectors. The bill also amended Section 54.320, RSMo 1969, by adding to that section new provisions respecting the limitation on the compensation of ex officio collectors. Section 54.320 as amended, reads as follows, the underscored matter being added by House Bill No. 265:

"The county treasurer in counties of the third and fourth classes adopting township organization shall be allowed a salary of not less than one hundred dollars per month by the county court to be paid as at present provided by law; the ex officio collector for collecting and paying over the same shall be allowed a commission of three percent on all corporation taxes, back taxes, licenses, merchants' tax and tax on railroads, and two percent on all delinquent taxes, which shall

Honorable James A. Noland, Jr.

be taxed as costs against such delinquents and collected as other taxes; he shall receive nothing for paying over money to his successor in office. Other provisions of law to the contrary notwithstanding, the total compensation of ex officio collectors shall not exceed the sum of ten thousand dollars annually, which maximum amounts shall include the costs of any deputy or assistants employed; except that, in all counties wherein the total amount levied for any one year exceeds two million dollars and is less than four million dollars, the ex officio collector shall present for allowance proper vouchers for all disbursements made by him on account of salaries and expenses of his office and other costs of collecting revenue, which shall be allowed as against the commissions collected by him; and out of the residue of commissions in his hands, after deducting the amounts so allowed, the ex officio collector may retain a compensation for his services not to exceed ten thousand dollars per year; and except that, the maximum compensation herein provided shall not be applicable to ex officio collectors in counties wherein the total amount levied for any one year exceeds four million dollars. The limitation on the amount to be retained as herein provided applies to fees and commissions on current taxes, but does not apply to commissions on the collection of back and delinquent taxes and ditch and levee taxes. All fees or commissions received by the ex officio collector in excess of the maximum amounts provided herein to be retained as compensation shall be paid into the county treasury."

Under Section 1.130, RSMo, the bill becomes effective September 28, 1973.

We do not have any factual situation before us and we are not inclined to speculate as to what the result would be with respect to all ex officio collectors.

Insofar as the new limits imposed by Section 54.320 constitute an increase in compensation during such officers' terms, such

Honorable James A. Noland, Jr.

an increase is prohibited by Section 13, Article VII of the Missouri Constitution. State ex rel. Emmons v. Farmer, 196 S.W. 1106 (Mo. banc 1917).

We regret, however, that a further definitive ruling is not practical in the absence of clear specific facts upon which to base such a ruling.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

November 7, 1973

OPINION LETTER NO. 273  
Answer by letter-Wood



Harold P. Robb, M.D., Director  
Division of Mental Health  
722 Jefferson Street  
Jefferson City, Missouri 65101

Dear Dr. Robb:

This letter opinion is in response to your question stated as follows:

"... whether a person holding both a boarding home license under House Bill No. 1165, 76th General Assembly and a license under Section 202.831 V.A.M.S. may keep patients under both licensing statutes together in the same facility.

"The problem arises from the provisions of Section 7 of House Bill No. 1165, supra. Is the provision above mutually exclusive?

"Thus, can a qualified and duly licensed home under both 'statutes' keep residents under House Bill No. 1165 and mentally retarded patients from Fulton under Section 202.831 V.A.M.S. in the same facility."

House Bill No. 1165, 76th General Assembly, Second Regular Session (approved June 22, 1972) provides for the licensing by the Division of Health of boarding houses for the aged. Sections 1-7, House Bill No. 204, 76th General Assembly, Second Regular Session (approved May 9, 1972) provides for the licensing by the Division of Mental Health of homes and institutions for the mentally retarded.

Harold P. Robb, M.D.

Section 1, House Bill No. 1165, defines a boarding house for the aged licensable under the act as:

" . . . a private home, . . . providing care . . . to three or more persons who are sixty years of age or over, all of whom are able to care for themselves, . . ." (emphasis added)

Section 7, House Bill No. 1165, prohibits a licensed boarding house from admitting or caring for persons who have been declared as mentally incompetent or who are mentally retarded.

We think it clear that a facility licensed as a boarding house for the aged cannot be licensed as a home or institution for mentally retarded persons and may not accept and care for persons who are mentally retarded or declared mentally incompetent. Conversely, we believe that a facility licensed as a home or institution for mentally retarded persons is thereby disqualified from obtaining or holding a boarding house for the aged license.

Although Section 202.831, RSMo (as amended by Section A 1-4, House Bill No. 204) authorizes the heads of the state mental health facilities to place certain of their patients in a "licensed boarding, or licensed nursing or family home," we do not believe this can override the explicit prohibition of House Bill No. 1165 so as to permit such placement of mentally retarded or declared mentally incompetent persons in licensed boarding houses for the aged.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

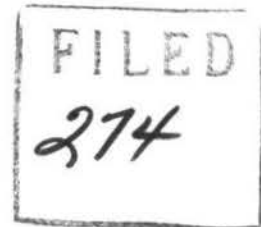
ELECTIONS:  
REGISTRATION:

1. It is mandatory that registration of voters in counties that adopted voter registration under Chapter 114, RSMo, be commenced by September 15 following the election at which voter registration was adopted. 2. Counties which have adopted voter registration under Chapter 114, RSMo, prior to September 28, 1973, will not be reimbursed by the state for cost of registration under Section 22 of SSHCSHB No. 20. 3. Only persons who are registered voters in Cole County are eligible to vote on November 6, 1973, on the formation of a county-wide sewer district.

OPINION NO. 274

September 5, 1973

Honorable James F. McHenry  
Prosecuting Attorney  
Cole County Courthouse  
Jefferson City, Missouri 65101



Dear Mr. McHenry:

This is in response to your request for an opinion from this office as follows:

"Section 114.040 RSMo 1969, provides that there shall be a registration of all qualified voters in all counties adopting this chapter beginning on the 15th day of September next following the date upon which this chapter is adopted. Senate Substitute for House Committee Substitute for House Bills Nos. 20, 71, 94 and 97, effective September 28, 1973, repeals many sections of Chapter 114 including Section 114.040, which gives rise to several questions:

1. Is it mandatory that the county clerk of Cole County, Missouri, begin registering voters outside the corporate limits of Jefferson City on or before September 15, 1973?
2. If the county clerk of Cole County, Missouri, does commence the registration of voters outside of the corporate limits of Jefferson City prior to September 28, 1973,



but does not complete the registration of such voters prior to that date, will Cole County be reimbursed for the cost of registering the voters after September 28, 1973, as provided in Section 22 of S.S.H.C. S.H.B.'s Nos. 20, 71, 94 and 97?

3. If the county clerk is not required to commence registration of voters outside of Jefferson City on or before September 15, 1973, and does not in fact register any such voters prior to September 28, 1973, will Cole County be reimbursed for registering voters outside the corporate limits of Jefferson City after September 28, 1973, as required by S.S.H.C. S.H.B.'s Nos. 20, 71, 94 and 97?
4. Is it necessary that voters residing outside of the corporate limits of Jefferson City be registered either under Chapter 114 or under S.S.H.C.S.H.B.'s Nos. 20, 71, 94 and 97 in order to vote on an election for the formation of a county-wide sewer district to be held November 6, 1973, as ordered by the Circuit Court of Cole County on August 6, 1973?
5. In any event, after September 28, 1973, will it be necessary to re-register voters residing within the corporate limits of Jefferson City who have previously registered under Chapter 116, RSMo 1969?

"Cole County is a second class county which contains a city of over 10,000. We previously have been operating under the provisions of Chapter 116 RSMo relative to the registration of voters. At the November, 1972, general election, county-wide voter registration was approved. No voters in the county at large have as yet been registered under the applicable provisions of Chapter 114 RSMo."

Your questions will be considered in the order in which they were submitted.

In answer to your first question whether it is mandatory that the county clerk of Cole County begin registering voters outside

Honorable James F. McHenry

the corporate limits of Jefferson City on or before September 15, 1973, it is our opinion that it is mandatory.

You state that at the November 1972 general election county-wide voter registration was approved in Cole County.

Section 114.040, subsection 1, RSMo, provides as follows:

"1. There shall be a registration of all qualified voters in all counties adopting this chapter beginning on the fifteenth day of September next following the date upon which this chapter is adopted, and the registration of voters shall be governed by the provisions of this chapter, except this chapter does not apply where:

(1) A city in the county has ten thousand or more inhabitants and already has a system of registration under chapter 116 or 118, RSMo, but applies only to the parts of the county as lie outside the corporate limits of the city; nor

(2) A county has more than two hundred thousand inhabitants and already has a system of registration under chapter 113, RSMo; nor

(3) A county contains a city or part of a city of more than four hundred thousand inhabitants and already has a system of registration under chapter 119, RSMo."

Although this statute will be repealed by Senate Substitute for House Committee Substitute for House Bill No. 20, which becomes effective September 28, 1973, it is effective now and will remain effective until September 28, 1973. It is our view that it is not a discretionary matter for the county clerk to determine or postpone the date of registration of qualified voters under this section. In Opinion No. 265, 1973, this office held that persons registered under Chapter 114, RSMo, are not required to re-register after September 28, 1973, under the provisions of SSHCSHB No. 20. Therefore, we do not have to decide whether registration would be required in Cole County if registration under Chapter 114 became invalid on September 28, 1973.

In answer to your second question as to whether Cole County will be reimbursed for the cost of registering the voters after September 28, 1973, as provided in Section 22 of SSHCSHB No. 20, it is our opinion the county will not be reimbursed.

Honorable James F. McHenry

Section 22 of SSHCSHB No. 20 provides as follows:

"The county court shall pay the expenses of registration incurred under the provisions of this act; and within one year immediately following the effective date of this act, the state shall pay to each county not having voter registration on the effective date of this act and in which registration of voters is required by the provisions of this act, in order to defray the initial costs of registration in such counties, a sum equal to one dollar times the number of votes cast for governor in the county during the next preceding gubernatorial election; provided however, that the number of votes cast in cities having voter registration in counties not having voter registration shall not be used in calculating the amounts due to counties not having voter registration."  
(emphasis added)

Under this section, only counties which do not have voter registration on September 28, 1973, and in which registration of voters is required by the provisions of SSHCSHB No. 20 will be reimbursed by the state as provided therein for the initial cost of voter registration. As heretofore stated, Cole County has, at this time, and will have on September 28, 1973, county-wide voter registration even though the voters have not been required to register before September 15, 1973.

We believe our answers to your first and second questions answer the third question.

In answer to your fourth question as to whether it is necessary that voters residing outside the corporate limits of Jefferson City be registered either under Chapter 114 or under SSHCSHB No. 20 in order to vote in an election for the formation of a county-wide sewer district to be held November 6, 1973, it is our opinion that they will be required to be registered. As pointed out above, in Opinion No. 265, 1973, we ruled that voters who are registered under Chapter 114 or 116, RSMo, on September 28, 1973, are not required to re-register but will be considered as registered voters under the provisions of SSHCSHB No. 20.

Section 2, subsection 1 of SSHCSHB No. 20 provides as follows:

"No person shall be permitted to vote in any election unless he is duly registered and unless his name thereby appears in both the

Honorable James F. McHenry

county record and the precinct record for the county and precinct in which he resides."

It is our opinion that under this section no person can vote in any election covered by this act unless he is duly registered at the time he offers to vote.

Section 114.070, RSMo provides as follows:

"At least five days prior to the initial registration under this chapter, the county clerk shall publish a notice of registration, giving the dates, hours and places of registration, in a newspaper of general circulation published in the county."

Under such section, five-day notice is given by the county clerk of the dates, hours and places of registration prior to the initial registration in a county which has adopted the provisions of Chapter 114.

Section 5 of SSHCSHB No. 20, provides as follows:

"Except as provided in section 6 and in subsection 2 of this section, registration shall be conducted at the office of the county clerk throughout the entire year, on the usual business days and at the regular office hours.

"No person shall be eligible to vote unless he has registered before 5:00 p.m. on the fourth Wednesday before the election is to be held."

Section 6 of SSHCSHB No. 20, provides as follows:

"The county clerk may designate additional places in the county, at which people may register within the time for registration. If any additional place of registry is established, the county clerk shall place a deputy in charge thereof. Registration shall be held at each additional place of registry at the times and hours the county clerk designates. The time and place of registration shall be published in at least two weekly or daily newspapers published in the county, at least one of which shall be of general circulation within the area of the additional place of registry, at least ten and not more than thirty days prior to the time of registration."

Honorable James F. McHenry

Under Section 5 of SSHCSHB No. 20, persons in Cole County who have not registered under provisions of Chapter 114, RSMo, may do so at any time on or after September 28, 1973, in the office of the county clerk on the usual business days and at the regular office hours up until the fourth Wednesday prior to the date of the election.

Under Section 6 of SSHCSHB No. 20, the county clerk may designate additional places in the county for registration of voters. Notice of the time and place of registration of such additional places shall be by publication at least ten days and not more than thirty days prior to the time of registration and persons who have registered before 5:00 p.m. on the fourth Wednesday before the election is to be held shall be eligible to vote at such election.

It is clear that under the provisions of Section 114.100, RSMo and Section 4 of SSHCSHB No. 20, the number of registration officers necessary to register voters may be employed. The Cole County Clerk will therefore be able to provide for registration of all voters outside of Jefferson City who wish to register before registration closes for the special election November 6, 1973.

We do not therefore have to rule on the question whether voters would be required to be registered if an election were scheduled to be held on a date which would occur before it would be possible for the voters to be registered.

In answer to your fifth question whether it will be necessary to re-register voters residing within the corporate limits of Jefferson City who have previously registered under Chapter 116, RSMo, it is our opinion that they will not be required to re-register. See Opinion No. 265, issued August 30, 1973.

We are enclosing herewith Opinion No. 143, issued by this office on May 2, 1973, holding that voter registration may begin at any time after publication of adoption of county local option voter registration under Chapter 114, RSMo.

#### CONCLUSION

It is the opinion of this office that:

1. It is mandatory that registration of voters in counties that adopted voter registration under Chapter 114, RSMo, be commenced by September 15 following the election at which voter registration was adopted.
2. Counties which have adopted voter registration under Chapter 114, RSMo, prior to September 28, 1973, will not be reimbursed by the state for cost of registration under Section 22 of SSHCSHB No. 20.

Honorable James F. McHenry

3. Only persons who are registered voters in Cole County are eligible to vote on November 6, 1973, on the formation of a county-wide sewer district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 265  
8-30-73, LeCompte

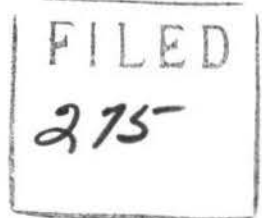
Op. No. 143  
5-2-73, Fleming





JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY  
1973



To School Boards Employing Restrictive Insurance Practices:

As indicated in the accompanying letter and advisory guidelines, this office has determined that those school districts in the state which have limited the awarding of insurance coverage by the establishment of restrictions that permit only agents or companies which either live in, pay taxes in or maintain an office in that district to be able to compete for such business are in violation of both the state and federal antitrust laws.

By complaint to this office or through previous correspondence with your school board, it has been determined that your district has established such restrictions either by passage of regulation or through custom and practice. Therefore, this office requests that your school district enter into a voluntary compliance agreement to assure this office that such practices are terminated.

This office assumes good faith on the part of all school boards within the state and views the necessity to institute legal action in court as a last option. However, the failure of a school district to enter into the voluntary compliance agreement attached to this letter within thirty days of receipt of this letter will render appropriate court proceedings necessary.

If you have any questions or comments please direct them to Kermit W. Almstedt, Assistant Attorney General, Supreme Court Building, Jefferson City, Missouri 65101 (Phone [314] 751-3321).

Very truly yours,

JOHN C. DANFORTH  
Attorney General



1973

FILED

275

VOLUNTARY COMPLIANCE AGREEMENT

The school district of \_\_\_\_\_  
[Name of School District]  
by the undersigned and as authorized by its Board of Education  
hereby enters into this voluntary compliance agreement with  
the Office of the Attorney General of the State of Missouri.  
The \_\_\_\_\_ hereby agrees  
[Name of School District]  
that it will not preclude persons, firms or corporations from  
competing for the business of insurance coverage for that dis-  
trict because said persons, firms or corporations do not live  
in, maintain offices in or pay taxes in that particular school  
district.

This agreement is not an admission by the above named  
school district that it has engaged in such practices.

The \_\_\_\_\_  
[Name of School District]

By \_\_\_\_\_  
[President of Board of  
Education]

Dated \_\_\_\_\_

\_\_\_\_\_ states that he is the  
[President of the Board of Education]  
President of the Board of Education of \_\_\_\_\_  
[Name of School  
District] and is duly authorized to enter  
into this voluntary compliance agreement on behalf of said  
school district.

ATTEST:

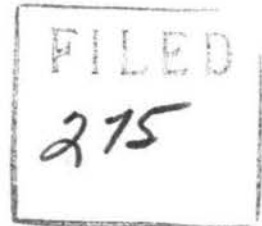
\_\_\_\_\_  
[Secretary to the Board of  
Education]



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

1973



To School Boards Within the State of Missouri:

Under the authority afforded the Office of the Attorney General by Chapter 416, RSMo 1969, to investigate and prosecute violations of the state antitrust laws, this office conducted an investigation into the manner by which school boards award insurance coverage for various programs in their districts. Pursuant to complaints filed with this office and an initial investigation conducted in the fall of 1972, it was determined that a number of school boards, either by promulgation of rules or through custom, have limited the awarding of their insurance coverage to those agents or firms which (1) reside in, (2) pay taxes in, or (3) maintain an office in their particular school districts.

Where such a policy exists an agent, firm or insurance company which fails to meet the qualifications is not allowed the opportunity to compete for the writing of that district's school insurance coverage.

In March, 1973, this office mailed to every school district in the state an investigatory letter to determine which school boards precluded insurance agents or firms from competing for the insurance business of that district unless they qualified under the restrictions as mentioned previously. This office was pleased that it not only received an approximate 95% response to the investigatory letter but that the overwhelming majority of school boards which addressed comments to us were appreciative of our investigatory effort in this field.

Our investigation disclosed that approximately 25% of the school districts in the state have established, either through

regulations or by custom, the exclusionary restrictions discussed above. It is this office's opinion that the existence of such exclusionary restrictions on an insurance agent or firm's right to compete for the school insurance business of any school district is a violation of the state and federal antitrust laws.

Under the state antitrust law, Chapter 416, RSMo 1969, school districts which have such restrictions in existence are subject to prosecution by this office. The school boards are also subject to private treble damage actions by those insurance agents or firms which were refused the opportunity to compete for the district's insurance business solely on the basis that they failed to satisfy the aforementioned exclusionary restrictions.

To date, this office has undertaken its investigation in anticipation that those school districts which have implemented such restrictions will voluntarily terminate them. As to those districts which do not, this office intends to pursue whatever action is authorized by Chapter 416, RSMo 1969, to achieve a termination of such restrictions including, if necessary, prosecution in court. It is hoped legal action will be unnecessary. As to those districts where information indicates that the offending practice exists a separate letter is included. This letter allows such district to enter into a voluntary compliance agreement with this office and thereby eliminate the practice without the necessity of this office instituting legal proceedings.

Since this office began its investigation, many school boards have requested that guidelines be issued whereby such boards can assure themselves that the manner in which they purchase their insurance coverage is not only free from suspicion under the state and federal antitrust laws but also will assure the purchase of the best insurance plan at the lowest premium with the greatest service benefits available. This office feels that the attached guidelines, while only advisory, should help to eliminate the questionable practices mentioned previously and assure the populace within any given school district that free, open and unfettered competition is present in the purchase of insurance coverage for that district.

If your school board has any specific questions or comments regarding the position taken by this office or as to any matters

related to the attached advisory guidelines please direct them to Kermit W. Almstedt, Assistant Attorney General, Supreme Court Building, Jefferson City, Missouri 65101 (Telephone: [314] 751-3321).

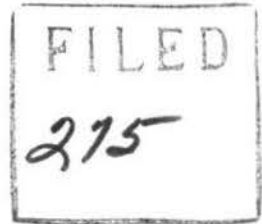
Very truly yours,

JOHN C. DANFORTH  
Attorney General



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY  
1973



ADVISORY GUIDELINES

Restrictions imposed by school boards which preclude insurance agents or firms from the opportunity to compete for the writing of insurance coverage for a school district unless the agent resides in, maintains an office in or pays taxes in the district violate the state and federal antitrust laws and must be terminated.

A school board has the lawful authority to assure itself that the writing agent or underwriting insurance company is reputable and will provide the necessary service not only in risk counseling before the implementation of the insurance plan but in followup service after the plan is consummated and service is required. This may be accomplished in several legally permissible ways, including (1) requiring a designated Best Rating; (2) making a financial and reputation check on the insurance agent and the underwriting company which has submitted a proposed insurance plan; and (3) requiring that the agent or company has a designated number of years of prior service and experience in the particular field for which it is proposing a plan to underwrite insurance risk coverages.

A school board may properly require that an insurance agent or firm be reasonably accessible to provide whatever continuing services the board deems necessary for an adequate insurance coverage plan. It must be emphasized, however, that whatever type or form of restriction is established that, in effect, places limitations on who or what type of insurance firms can compete for the school board's insurance coverage such restriction cannot be a mere subterfuge to allow a select group of persons or firms to monopolize the insurance coverage of a particular school district.

Competitive bidding is a way by which school boards can undertake the purchasing of their insurance coverage and do so in a manner which does not offend state and federal anti-trust laws if exercised properly. Competitive bidding in the purchase of insurance coverage is not required by federal or state statutes. Where competitive bidding is employed, however, the school board should take whatever steps are necessary to solicit bids from all insurance agents or firms that have evidenced a desire to compete for that district's school insurance business. Also, advertisements for bids on insurance coverage should be published in newspapers of general circulation for a period of time sufficient to allow all interested parties the opportunity to contact the school board. In those districts where the availability of competing agents or firms is limited (particularly in rural districts) the advertisements should be widespread and placed in surrounding cities or counties so that the school board will be assured that all interested parties are afforded the opportunity to compete for the writing of such policies. Any requirement that permits only "local" agents to bid or any custom which informs only "local" agents of the school board's offer to purchase insurance is contrary to the state and federal antitrust laws as arbitrarily excluding other agents or firms from the opportunity to submit bid proposals. "Local" bidder preference rules or regulations which prefer "local" bidders over others are also in violation of the antitrust laws unless they are written to prescribe that where premium and coverage are equal then and only then the "local" bidder may be preferred.

It is understood that service, while an intangible element in the consideration of the insurance plan, may be considered an important factor in the ultimate award of insurance coverage. School boards, however, may not allow the service consideration to become a subterfuge for circumventing the antitrust laws and unlawfully allowing a select group of agents or firms to monopolize that school district's insurance coverage.

One method which has been successfully employed by a number of school districts and has afforded those districts insurance coverage marketed to achieve optimum cost and protection is the hiring of an Agent of Record. Generally, such Agent of Record is hired after interviewing applicants for the position in an effort to secure the widest possible choice. The Agent of Record generally develops a risk management program for the district; provides the maintenance and related services connected with the filing of insurance claims and reports; offers continuing advice and consultation to the school board; and,

establishes and maintains a listing of carrier companies that would be approached or asked to compete for quotations on the school district's insurance coverage plans. When a school board determines its desire to have an Agent of Record to supervise and handle its insurance coverage programs, it should implement a program whereby all interested agents or firms which are capable of providing such service are afforded the opportunity to compete for the position. Again, exclusionary restrictions cannot be established that allow only "local" agents the opportunity to compete for such a position.

In numerous districts, associations of insurance agents exist which afford counseling services to the school board on matters related to the district's insurance program needs. While the practice and service is commendable and is a manner by which a school board may obtain the technical information and services necessary to implement a good insurance program, some associations have abused their relationships with school boards by securing regulations which afford "local" agents a monopoly of the school insurance business. Where local insurance agents' associations exist with no purpose but to secure, either through anti-competitive means or by exertion of patronage pressure, the insurance program coverage for that district, such practices themselves are inimical to the antitrust laws. School boards should be aware of such and should not become a participant in a combination in violation of the state and federal antitrust laws.



14 June 1975  
sent Dec. 1975  
No 275

ADVISORY GUIDELINES

The following practices, whether adopted by regulation or by custom, have the effect of excluding insurance firms or agencies from competing for a municipality's insurance business. As unreasonable restraints on trade, they violate state and federal antitrust laws and must be terminated:

1. Successively awarding insurance coverage to the same firm or agency without affording other firms or agencies the opportunity to compete.
2. Splitting the award of insurance coverage among local firms or agencies.
3. Awarding the insurance coverage to only local firms or agencies.
4. Utilizing competitive bidding but with the restriction that only local firms or agencies be allowed to compete.
5. Utilizing an agent of record system but restricting the agent of record to a local firm or agency, which agent retains a percentage of the commission earned on the insurance premium with the remainder of the commission being split on an agreed upon manner among other agencies.
6. Awarding the insurance coverage only through local insurance agents' associations or like committees of selected insurance agents.
7. Restricting those firms or agencies who can compete for a municipality's insurance coverage to firms or agencies which reside in, maintain offices in, pay taxes in, or maintain some other form of localized contact with the municipality.

A municipality has the lawful authority to assure itself that the writing agent and underwriting insurance company are reputable and will provide necessary service in both risk counseling before the implementation of the insurance plan and in follow-up service after the insurance coverage is purchased. This may be accomplished in several legally permissible ways, including (1) requiring a designated Best Rating; (2) making a financial and reputation check on the insurance agent and the underwriting company which have submitted a proposed insurance plan; and (3) requiring that the agent or company have a designated number of years of prior service and experience in a particular field for which it is proposing an insurance plan.

A municipality may properly require that an insurance agent or firm be reasonably accessible to provide whatever continuing services are deemed necessary for an adequate insurance coverage plan. It must be emphasized, however, that whatever type or form of restriction is established it cannot be a mere subterfuge to allow a select group of persons or firms to monopolize the insurance coverage of a municipality or to maintain the award of insurance coverage among agents or firms having a local connection.

Competitive bidding is a way by which municipalities can undertake the purchasing of their insurance coverage in a manner which does not offend state and federal antitrust laws. Competitive bidding in the purchase of insurance coverage is not required by state or federal statutes. Where competitive bidding is employed, however, the municipality should take whatever steps are necessary to solicit bids from all insurance agents or firms that desire to compete for that municipality's insurance business. Advertisements for bids on insurance coverage should be published in newspapers of general circulation for a period of time sufficient to allow all interested parties the opportunity to contact that municipality. In those areas where the availability of competing agents or firms is limited (particularly in rural areas) the advertisements should be widespread and placed in surrounding cities or counties so that the municipality will be assured that all interested parties are afforded the opportunity to compete for the writing of such policy. Any requirement that permits only local agents to bid or any custom which informs only local agents of the municipality's offer to purchase insurance is contrary to state and federal antitrust laws. Local bidder preference rules or regulations which prefer local bidders over others are also in violation of the antitrust laws unless they are written to prescribe that where premium and coverage are equal then and only then the local bidder may be preferred.

It is understood that service, while an intangible element in the consideration of the insurance plan, may be considered an important factor in the ultimate award of insurance coverage. Again, it must be emphasized, however, that municipalities may not allow the service consideration to become a subterfuge for circumventing the antitrust laws in unlawfully allowing a select group of agents or firms to monopolize that municipality's insurance coverage.

Another method which has been employed successfully in this state is the hiring of what is known as an Agent of Record. Generally, such Agent of Record is hired after an interviewing process designed to secure the widest possible choice. The

Agent of Record generally develops a risk management program for the municipality, provides the maintenance and related services connected with the filing of insurance claims and reports, offers continuing advice and consultation to the municipality, and establishes and maintains a listing of carrier companies that would be approached or asked to compete for quotations on the municipality's insurance coverage plans. When a municipality determines its desire to have an Agent of Record to supervise and handle its insurance coverage programs, the municipality should implement a program whereby all interested agents or firms which are capable of providing such service are afforded the opportunity to compete for the position. Again, exclusionary restrictions cannot be established that allow only local agents or a select group of agents the opportunity to compete for such a position.

In numerous areas, associations of insurance agents exist which afford counseling services to municipalities and other political entities on matters related to insurance needs. While the practice and service is commendable and is a manner by which a municipality may obtain the technical information and services necessary to implement a good insurance program, some associations have abused their relationship with the local municipality by securing adoption of qualifications which afford local agents a monopoly of the municipality's insurance business. Where local insurance agents' associations secure, through anticompetitive means, the insurance coverage for that district, such practices are inimical to the antitrust laws.

In summary, whatever system is utilized by a municipality for the purchase of its insurance coverage, the system must afford to all interested parties, who qualify under reasonable and predetermined criteria, an equal opportunity for the sale of insurance coverage to that municipality.

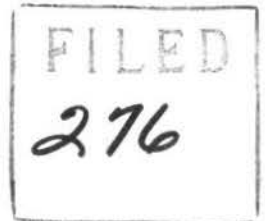
AGE:  
POLICE:  
OFFICERS:

The provision of Section 84.480, RSMo Supp. 1971, which prohibits the appointment of a person as chief of police of Kansas City who is "more than sixty years of age" applies to a person who has reached his sixtieth birthday.

OPINION NO. 276

September 5, 1973

Mr. John C. Craft  
Secretary-Attorney  
Board of Police Commissioners  
1125 Locust Street  
Kansas City, Missouri 64106



Dear Mr. Craft:

This opinion is in answer to your request asking for an interpretation of the provision in Section 84.480, RSMo Supp. 1971, relative to the office of police chief of Kansas City which provides in part that:

" . . . At the time of the appointment the chief shall not be more than sixty years of age, . . . "

There appears to be some conflict in the various decisions in the United States, 86 C.J.S. Time §8. However, we believe the correct rule to be that "when one reaches the age of 18 years he 'is over the age of 18.'" In the Matter of the Application of John Smith, Jr., 351 P.2d 1076 (Crim.App. Okla. 1960). Notably, the Oklahoma Court of Criminal Appeals in that instance distinguished previous cases of the Supreme Court of Oklahoma construing insurance contracts which held that a person is not over a specified age until he has passed his birthday next, beyond the age specified, as being cases based on contractual obligations. Id. at 1078.

In Missouri, with respect to elections, the Missouri Supreme Court in Totton v. Murdock, 482 S.W.2d 65 (Mo. banc 1972) held that a person who celebrated his eighteenth birthday on August 9, 1972, is eighteen on August 8, 1972, "under the accepted theory that a birthday is, in fact, the first day of another year."

Another case in point is Green v. Patriotic Order Sons of America, Inc., 87 S.E.2d 14 (N.C. 1955) in which the Supreme Court of North Carolina held that when a person reaches his fiftieth

Mr. John C. Craft

birthday he has lived fifty calendar years of twelve months each, and after his fiftieth birthday he is over fifty years of age. The Oklahoma and North Carolina cases both relied on Bay Trust Co. v. Agricultural Life Ins. Co., 271 N.W. 749 (Mich. 1937) in which the Supreme Court of Michigan held that a person two months and ten days past his sixtieth year was "over age of 60 years."

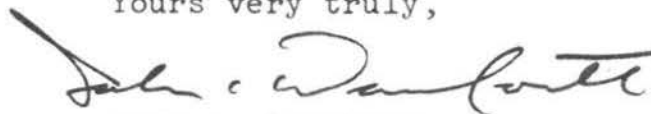
We therefore conclude that, in the premises, a person who has passed his sixtieth birthday is "more than sixty years of age."

#### CONCLUSION

It is the opinion of this office that the provision of Section 84.480, RSMo Supp. 1971, which prohibits the appointment of a person as chief of police of Kansas City who is "more than sixty years of age" applies to a person who has reached his sixtieth birthday.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH  
ATTORNEY GENERAL

December 20, 1973

OPINION LETTER NO. 278

Mr. Charles O'Halloran  
State Librarian  
Missouri State Library  
308 East High Street  
Jefferson City, Missouri 65101

Dear Mr. O'Halloran:

This is in response to your request for an opinion on the following question:

"The 76th General Assembly passed Senate Bill 581 which provides that 'in case a county library district is established and a free county library authorized as provided in section 182.010, within sixty days after the establishment of the county library district, there shall be created a county library board of trustees.  
. . . .'

"The 76th General Assembly also passed Senate Bill 583 which provides that the County Court of any County may create a county library district without a petition or submission to the voters as provided in Section 182.010. (This is contained in Section 182.015 of Senate Bill 583.)

"My question is: Does Senate Bill 581 authorize the County Court to appoint a Library Board of Trustees of five members within sixty days of the establishment of a free County Library, if that County Library District is established under provision of Senate Bill 583 (Section 182.015)?"

Mr. Charles O'Halloran

In 1972 Senate Bill 583, Section 1, 76th General Assembly, (Section 182.015, V.A.M.S.), provided a method for the creation of a county library district without petition as an alternative to the method provided by Section 182.010, RSMo 1969, which required a petition. The legislature also passed Senate Bill 581 of the 76th General Assembly (Section 182.050, V.A.M.S.), which provides the method for establishing a first board of trustees of a county library district created pursuant to Section 182.010. Since Senate Bill 583 requires that the formation of a county library district under its provisions be consistent with Section 182.010, except for the requirement of a petition, and an additional requirement that the county library district not contain any part of a regional library system, it follows that the first board of directors of a district formed under the provisions of Senate Bill 583 would be created in the same way that a board be created if the district had been formed under Section 182.010. Therefore, Senate Bill 581, Section 182.050, V.A.M.S., is applicable to the creation of the first board of directors for library districts formed under Senate Bill 583.

Very truly yours,



JOHN C. DANFORTH  
Attorney General





JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

December 20, 1973

OPINION LETTER NO. 279

Mr. Charles O'Halloran  
State Librarian  
Missouri State Library  
308 East High Street  
Jefferson City, Missouri 65101

Dear Mr. O'Halloran:

This letter is issued in response to your request for an opinion on the following question:

"The 76th General Assembly passed Senate Bill 583, in which bill was included Section 182.015. Section 182.015 provides that the County Court may create a County Library District without a petition or submission to the voters as provided in Section 182.010. Section 182.015 further provides that the County Court shall propose an annual rate of taxation, which proposal shall be submitted to a vote of the people in the same manner as though the district were formed under the provisions of 'that section', i.e., Section 182.010.

"Since Section 182.015 does not involve a petition, and therefore, a date, can the County Court call a special election for a vote on the levy under Section 182.015, or must the election under this new section be held in connection with the annual school election?"

Section 182.015, V.A.M.S., Laws 1972, page 99, provides for the formation of a county library district without petition or submission to the voters. Such section then goes on to state that the county court shall propose an annual tax rate which:

Mr. Charles O'Halloran

" . . . shall be submitted to a vote of the people in the same manner as though the district were formed under the provisions of that section. . . ." [Section 182.010]

Section 182.010, RSMo 1969, provides for elections on the tax rate for county libraries after petition. Such section states that the election shall be held:

" . . . at the next annual school election, or a special election to be held on the date stated in the petition. . . ."

Since Section 182.015 does not provide for a petition, the provision in Section 182.010 that the election with respect to the tax rate shall be held on the date specified in the petition is inapplicable to a district created in accordance with Section 182.015 and the election is held on the date of the next annual school election.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

LICENSES:  
AMBULANCES:  
DIVISION OF HEALTH:

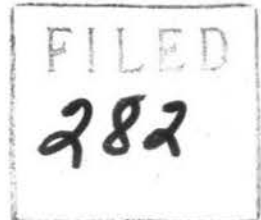
Senate Bill No. 57, 77th General Assembly, does not require that attendants or attendant-drivers of ambulances must be licensed

as mobile emergency medical technicians. Subsection (11) of Section 1 and Section 9 of Senate Bill No. 57 become effective September 28, 1973, and all other provisions of said act become effective July 1, 1974. However, since Section 1, subsection (8) provides the Director of the State Division of Health is the "license officer" and this section does not become effective until July 1, 1974, the Director of the Division of Health does not have authority to issue a license to a "mobile emergency medical technician" until that date.

OPINION NO. 282

September 18, 1973

Honorable Hardin C. Cox  
Representative, District 6  
605 Bluff Street  
Rock Port, Missouri 64482



Dear Representative Cox:

This is in reply to your request for an opinion from this office as follows:

- "1. Does Section 9 of Senate Bill No. 57 of the 77th General Assembly require that attendants or attendant drivers of ambulances must be licensed as 'mobile emergency medical technicians'.
- "2. Are all the provisions of Senate Bill No. 57 of the 77th General Assembly except Section 1, subsection 11 and Section 9 effective before July 1, 1974.

"A question has arisen as to whether or not under provisions of Section 9 of Senate Bill No. 57, ambulance attendants or ambulance driver attendants must be licensed as 'mobile emergency medical technicians' in order to carry out their duties in connection with providing ambulance service.

"The question has also arisen concerning the authority of the General Assembly to provide

Honorable Hardin C. Cox

that all the provisions of Senate Bill No. 57 shall become effective July 1, 1974, except the provisions of Section 1, subsection 11 and Section 9."

Each question will be considered in the order in which they were submitted.

Section 1 of Senate Bill No. 57, 77th General Assembly, to which you refer, defines the words and terms as used in this act in part as follows:

"Section 1. As used in this act, unless the context clearly indicates otherwise, the following words and terms shall mean:

\* \* \*

(3) 'Attendant', a trained and qualified individual responsible for the operation of an ambulance and the care of the patients transported thereby whether or not the attendant also serves as driver;

(4) 'Attendant-driver', a person who is qualified as an attendant and a driver;

\* \* \*

(8) 'License officer', the director of the division of health of the state of Missouri or his duly authorized representative;

\* \* \*

(11) 'Mobile emergency medical technician', a licensed attendant who has been specially trained in emergency cardiac and non-cardiac care, and who has successfully completed an emergency service training program certified by the health officer as meeting the requirements of this act."

Section 2, subsections 1 and 2 of Senate Bill No. 57 provides:

"Section 2. 1. No person, either as owner, agent or otherwise, shall furnish, operate, conduct, maintain, advertise, or otherwise be engaged in or profess to be engaged

Honorable Hardin C. Cox

in the business or service of the transportation of patients upon the streets, alleys, or any public way or place of the state of Missouri unless he holds a currently valid license for an ambulance, issued pursuant to the provisions of this act.

"2. No ambulance shall be operated for ambulance purposes, and no individual shall drive, attend or permit it to be operated for such purposes on the streets, alleys, or any public way or place of the state of Missouri unless it is under the immediate supervision and direction of a person who is holding a currently valid license as an attendant-driver or attendant; except that, nothing in this section shall be construed to mean that a duly licensed registered nurse or a duly licensed physician be required to hold an attendant-driver or attendant license."

Section 9, subsection 1 of Senate Bill No. 57 provides as follows:

"Section 9. 1. Notwithstanding any other provision of this act, mobile emergency medical technicians may do any of the following at the scene of the accident in an ambulance or at the emergency room of a licensed hospital:

(1) Render rescue, first-aid and resuscitation services;

(2) Perform cardiopulmonary resuscitation and defibrillation in a pulseless, non-breathing patient; and,

(3) During training at the hospital and while caring for patients in the hospital administer parenteral medications under the direct supervision of a physician or a registered nurse.

(4) Where voice contact or a telemetered electrocardiogram is monitored by a physician or a registered nurse authorized by a physician, and direct communication is maintained, mobile emergency medical technicians may, upon order of such licensed physician or such licensed registered nurse do any of the following:

Honorable Hardin C. Cox

- (1) Administer intravenous saline or glucose solutions;
- (2) Perform gastric suction by intubation;
- (3) Perform endotracheal intubation; and,
- (4) Administer parenteral injections of any of the following classes of drugs:
  - (a) Antiarrhythmic agents;
  - (b) Vagolytic agents;
  - (c) Chronotropic agents;
  - (d) Analgesic agents;
  - (e) Alkalinizing agents;
  - (f) Vasopressor agents; and,
  - (g) Other drugs which may be deemed necessary by such ordering physician.
- (5) Deliver emergency medical car to the sick and injured while in the emergency department of a licensed hospital and until care responsibility is assumed by a licensed physician or a licensed registered nurse."

Section 10 of Senate Bill No. 57 provides for separate licenses to be issued to an attendant, attendant-driver, and mobile emergency medical technician each with different qualifications.

No ambulance shall be operated and no individual shall drive such vehicle on the streets and highways unless it is under the immediate supervision and direction of a person who is holding a valid license as an attendant-driver or an attendant except a duly licensed registered nurse or a duly licensed physician or in rendering assistance to licensed ambulances in case of an emergency or when operated from a location outside of Missouri to transport patients picked up beyond the limits of Missouri to locations within or outside the state of Missouri.

In answer to your question whether an attendant or attendant-driver of an ambulance must be licensed as a mobile emergency medical technician, our answer is in the negative. It is our opinion

Honorable Hardin C. Cox

that a licensed ambulance may be operated by a duly licensed attendant or licensed attendant-driver who is not licensed as a mobile emergency medical technician and who does not perform or profess to perform such services as provided for under Section 9, supra. It is our view that Section 9, supra, provides that mobile emergency medical technicians may perform certain services designated therein at the scene of an accident in an ambulance or at the emergency room at a licensed hospital but that it is not mandatory that such service be furnished.

In answer to your second question in regard to the date when the provisions of this act become effective, it provides as follows:

"The provisions of this act shall become effective as of July 1, 1974, provided that the provisions of Section 1 (11) and of Section 9 of this act shall become effective on September 30, 1973."

Article III, Section 29, Constitution of Missouri, provides that no law passed by the General Assembly shall take effect until ninety days after the adjournment of the session at which it was enacted except an appropriation act or an emergency bill which must be declared as an emergency by two-thirds vote of the members of each house.

Senate Bill No. 57 does not have an emergency provision. Therefore it cannot become effective until ninety days after the adjournment of the legislature which will be September 28, 1973.

The question you have submitted concerns the validity of the effective date or dates of the different provisions of Senate Bill No. 57 as provided in Section A of said bill.

The general principles of law in regard to the taking effect of parts of acts of the legislature as stated in said act is stated in 82 C.J.S. Statutes § 411 as follows:

"While there is some authority to the contrary, the rule has been laid down that, in the absence of express provision to the contrary, part of an act may go into effect on its passage, while other parts become effective at different times expressed in the act, and a contingency which postpones some parts does not prevent other parts from taking effect on passage, and that the legislature may direct that different parts of the same statute shall



Honorable Hardin C. Cox

go into effect at different times. Under a constitutional provision requiring the legislature to prescribe the time when its act shall be in force, a single definite time must be fixed at which each act shall take effect as an entirety. Also, under a constitutional provision that all laws of a general nature shall have a uniform operation, different provisions of a statute cannot go into effect at different times as to different persons; but under constitutional provisions requiring all parts of a statute to take effect at the same time, it is sufficient that the statute becomes effective as an entirety at one time, notwithstanding as to some persons or matters affected by it it becomes operative at different times."

In State ex rel. Otto v. Kansas City, 276 S.W. 389 (Mo. banc 1925), the question was the effective date of certain provisions of the charter of Kansas City, Missouri, which had been approved by a vote of the people. The question in this case before the court was stated as follows, l.c. 391:

"This charter consists of 488 sections. Section 486 thereof provides that sections 98, 108, 125, 417 to 425, both inclusive, 457, 458, 486, and 488, shall take effect immediately upon the adoption of said charter, and that the remaining 472 sections shall take effect at 10 a. m., April 10, 1926. . . ."

In discussing the rule of law in this state on this question, the court stated as follows, l.c. 395:

"It is familiar law that a statute or a constitutional provision may have a potential existence, though it will not go into operation until a future time. State ex rel. v. Dirckx, 211 Mo. 568, loc. cit. 578, 111 S. W. 1; Poindexter v. Pettis County, 295 Mo. 629, 246 S. W. 38, loc. cit. 40; State ex rel. Brunjes v. Bockelman (Mo. Sup.) 240 S. W. 209, loc. cit. 211. Where not prohibited by the Constitution, the Legislature may direct that different parts of the same statute shall go into effect at different times, and, even under constitutional provisions requiring all

Honorable Hardin C. Cox

parts of a statute to take effect at the same time, it is sufficient that the statute becomes effective as an entirety at one time, notwithstanding that, as to some persons or matters affected by it, the statute becomes operative at different times. 36 Cyc. 1201. The time a particular statute shall take effect may be fixed by another statute passed at the same session. *Honeycutt v. Ry. Co.*, 40 Mo. App. 674, cited with approval in *State ex rel. Brunjes v. Bockelman*, supra."

Applying these principles of law to the question at issue, it is our opinion that subsection (11) of Section 1 and Section 9 of Senate Bill No. 57 become effective September 28, 1973, and the other provisions of said act become effective July 1, 1974. Since the provision of the statute providing for the Director of the State Division of Health or his duly authorized representative to be the license officer does not become effective until July 1, 1974, the Director of the State Division of Health is without authority to issue a license to a "mobile emergency medical technician" until that date.

#### CONCLUSION

It is the opinion of this office that Senate Bill No. 57, 77th General Assembly, does not require that attendants or attendant-drivers of ambulances must be licensed as mobile emergency medical technicians. Subsection (11) of Section 1 and Section 9 of Senate Bill No. 57 become effective September 28, 1973, and all other provisions of said act become effective July 1, 1974. However, since Section 1, subsection (8) provides the Director of the State Division of Health is the "license officer" and this section does not become effective until July 1, 1974, the Director of the Division of Health does not have authority to issue a license to a "mobile emergency medical technician" until that date.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

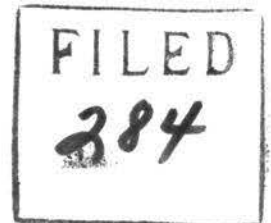


JOHN C. DANFORTH  
Attorney General

September 4, 1973

OPINION LETTER NO. 284  
Answer by Letter - Klaffenbach

Honorable Wesley A. Miller  
State Representative, District 121  
801 East First Street  
Washington, Missouri 63090



Dear Representative Miller:

This letter is in response to your question asking:

"May a circuit public defender service counties in circuits which do not have sufficient population to qualify for a state public defender if they can obtain 'LEAC' funds to pay the salary of the defender and the costs?"

We understand that the public defender would represent defendants in a circuit other than the one in which he serves and would be paid for such services from a Law Enforcement Assistance Council grant.

We note that House Bill No. 1314 of the 76th General Assembly, commonly known as the public defender act, provides for full-time public defenders for certain circuits. In circuits not having public defenders, private attorneys are appointed and paid for their services.

We held in our Opinion No. 108 dated February 23, 1973, that public defenders are not prohibited from employing additional assistants to be paid from federal grant funds for the purpose of defending indigents in juvenile and misdemeanor cases. However, we do not believe that these situations are comparable. In the premise you pose the defender would be serving an area not included within the circuit for which he was appointed.

Honorable Wesley A. Miller

We believe that the legislature intended that the public defenders devote full-time to the functions they are by law required to perform within their circuits under the provisions of Section 3 of House Bill No. 1314, and that further legislation is required to authorize the defenders to serve areas not within their circuits.

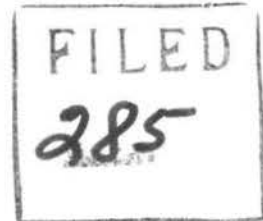
Very truly yours,

JOHN C. DANFORTH  
Attorney General

November 14, 1973

OPINION LETTER NO. 285  
Answer by Letter - C. B. Blackmar

Mr. Peter W. Salsich, Jr.  
Chairman, Missouri Housing  
Development Commission  
3642 Lindell Boulevard  
St. Louis, Missouri 63108



Dear Mr. Salsich:

This is to acknowledge your opinion request of August 21, 1973, in which you inquire about the validity of the appropriation of \$1,000,000 by the Missouri General Assembly in CASHB No. 4 of the 77th General Assembly, as follows:

"Section 4.216. To the Missouri Housing  
Development Commission

For initial funding of the Missouri Housing  
Development Commission Mortgage Insurance  
Reserve Fund

From the Revenue Sharing Trust Fund . . \$1,000,000"

We understand that the Commission operates by selling bonds to the public and using the proceeds to make loans "to finance the building or rehabilitation of residential housing designed and planned to be available at low and moderate rentals or to be sold to low and moderate-income families. . . ."; that the loans made by the Commission are secured by mortgages or deeds of trust on the real estate involved; and that some of these loans may be insured against loss by federal authority, but that it is contemplated making loans which are not so insured.

The basic plan of Chapter 215 of the Missouri Revised Statutes was considered in our Opinion No. 140, issued July 6, 1971, a copy of which we enclose. That opinion held that the purpose

Mr. Peter W. Salsich, Jr.

of providing housing for low and moderate income families was a proper public purpose, and that the statutory plan did not constitute an invalid grant for a private purpose, nor did it constitute the pledging of public credit in aid of private individuals, so as to violate Article III, Sections 38(a), 39(1) or 39(2) of the Missouri Constitution.

We understand that the Commission now proposes to establish an "insurance fund" of which the initial component will be the legislative appropriation described above, and that the fund will be supplemented by charges against borrowers. We assume that this fund will apply only to mortgages and deeds of trust which are not otherwise fully insured by other agencies. This fund may constitute the entire "insurance" for a particular loan, or may supplement other insurance. The proceeds of the fund will be under the control of the Commission, and we presume that they will be invested. The ultimate beneficiaries of the "insurance" will be the bondholders, who will receive additional assurance that their obligations will be discharged as they come due.

We believe that the establishment and operation of the fund in this manner is valid and not in violation of the Missouri Constitution, for the same reasons that are set out in Opinion No. 140 as to the basic statutory plan. As Opinion No. 140 shows, the Commission's commitments to the bondholders are not general obligations of the state and do not constitute the lending of the credit of the state. The Commission is confined to its own resources, and the legislature may properly supply it with funds for the statutory purposes. We consider that the establishment of the "insurance" fund as described above is an appropriate means for the exercise by the Commission of its statutory powers, and that it is not necessary that the precise plan be set out in detail in the statutes.

Our conclusion seems consistent with statements in the opinion of the Supreme Judicial Court of Massachusetts in Massachusetts Housing Finance Agency v. New England National Bank, 249 N.E.2d 599 (Mass. 1969). We do not consider it significant that statutes of some other state contain detailed findings and recitals which are not present in the Missouri statutes. It is not the custom of the General Assembly to include findings and recitals. The public purpose of a statute is to be gleaned from its face, and, as Opinion No. 140 demonstrates, we consider that Chapter 215 is satisfactory from the public purpose standpoint.

It is therefore our view that an appropriation to the Missouri Housing Development Corporation to establish a fund for

Mr. Peter W. Salsich, Jr.

the "insurance" of loans made by it pursuant to Chapter 215 of the Missouri Revised Statutes is valid, and not in violation of Article III, Sections 38(a), 39(1), 39(2), or other provisions of the Missouri Constitution.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 140  
7/6/71, Salsich



LABOR: Section 292.170, RSMo, which requires seating  
FEMALE LABOR: for women at work is partially in conflict with  
Title 42 U.S.C. Sec. 2000e and 29 C.F.R. Sec.  
1604.2(b)(4) and in such areas of conflict the state law must give  
way to the federal requirements. Therefore, an employer must pro-  
vide seats for all employees or prove that business necessity pre-  
cludes such seats and not provide them for any employees.

OPINION NO. 287

December 21, 1973

Mr. Edwin Pruitt, Jr., Chairman  
Missouri Commission on Human Rights  
314 East High Street  
Jefferson City, Missouri 65101



Dear Mr. Pruitt:

You have asked for an official opinion as to whether Section 292.170, RSMo, has been superseded by Title 29 C.F.R. Sec. 1604.2 (b)(4) and 42 U.S.C. Sec. 2000e-2. You have further referred me to the cases of Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) and Public Utilities Commission of California v. United States, 355 U.S. 534 (1958).

Section 292.170, RSMo, provides:

"In every manufacturing, mechanical, mercan-  
tile and other establishment in this state  
wherein girls or women are employed there  
shall be provided and conveniently located  
seats sufficient to comfortably seat such  
girls or women, and during such times as  
such girls or women are not necessarily re-  
quired by their duties to be upon their feet,  
they shall be allowed to occupy the seats  
provided."

42 U.S.C. Sec. 2000e-2(a) provides:

"(a) Employers. It shall be an unlawful em-  
ployment practice for an employer--

(1) to fail or refuse to hire or to dis-  
charge any individual, or otherwise to  
discriminate against any individual with  
respect to his compensation, terms, con-  
ditions, or privileges of employment,

Mr. Edwin Pruitt, Jr.

because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. Sec. 2000e-12(a) provides:

"(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title [42 USCS §§ 2000e-2000e-17]. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act."

29 C.F.R. Sec. 1604.2(b)(4) provides:

"(4) As to other kinds of sex-oriented State employment laws, such as those requiring special rest and meal periods or physical facilities for women, provision of these benefits to one sex only will be a violation of title VII. An employer will be deemed to have engaged in an unlawful employment practice if:

(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the provision of such benefits; or

(ii) It does not provide the same benefits for male employees. If the employer can prove that business necessity precludes providing these benefits to both men and women, then the State law is in conflict with and superseded by tile [sic] VII as to this employer. In this situation, the employer shall not provide such benefits to members of either sex."

Mr. Edwin Pruitt, Jr.

The cases of Gibbons v. Ogden, supra, and Public Utilities Commission of California v. United States, supra, are illustrious members of a large family of cases holding that, in areas where the Congress is constitutionally able to pass laws, its laws will have supremacy over state laws on the same subject. There is no doubt that the provisions of 42 U.S.C. Sec. 2000e-2 fall into such an area and therefore 42 U.S.C. Sec. 2000e-2 supersedes any state laws dealing with the issue of employment discrimination.

42 U.S.C. Sec. 2000e-12(a) gives the Equal Employment Opportunity Commission authority to issue, amend or rescind regulations to further the purposes of the act. These regulations are published in the Code of Federal Regulations under the Federal Register Act and Executive Order No. 9930, Fed. 4, 1948, 13 F.R. 519. The Code of Federal Regulations has the force and effect of law, Sheridan-Wyoming Coal Co. v. Krug, 172 F.2d 282 (D.C. Cir. 1949) reversed on other grounds, 338 U.S. 621, 70 S.Ct. 392, 94 L.Ed. 393 (1950) and must be judicially noticed as prima facie evidence of the regulations included, Wei v. Robinson, 246 F.2d 739 (8th Cir. 1957) cert. denied, 355 U.S. 879, 78 S.Ct. 144, 2 L.Ed.2d 109 (1957).

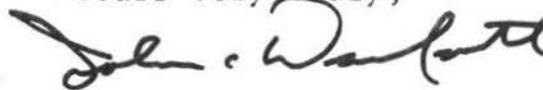
29 C.F.R. Sec. 1604.2(b)(4) set out above deals with guidelines on discrimination because of sex, the same issue dealt with by Section 292.170, and, therefore, supersedes as much as Section 292.170 as is in conflict with the federal guidelines. In this instance, the employer must provide seats for both women and men unless he is able to prove that business necessity precludes providing seats for both sexes, in which case he shall not provide them for either sex.

#### CONCLUSION

It is the opinion of this office that Section 292.170, RSMo, which requires seating facilities for women at work is partially in conflict with Title 42 U.S.C. Sec. 2000e and 29 C.F.R. Sec. 1604.2(b)(4) and in such areas of conflict the state law must give way to the federal requirements. Therefore, an employer must provide seats for all employees or prove that business necessity precludes such seats and not provide them for any employees.

The foregoing opinion, which I hereby approve, was prepared by my assistant Anne E. Forry.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

LABOR:  
FEMALE LABOR:

Section 290.060, RSMo, dealing with  
the employment of pregnant women,  
has been superseded by 42 U.S.C.,

§ 2000e-2(a) and 29 C.F.R., § 1604.2(b) and employers are no  
longer required to comply with such statute.

OPINION NO. 288

December 21, 1973

Mr. Edwin Pruitt, Jr., Chairman  
Missouri Commission on Human Rights  
314 East High Street  
Jefferson City, Missouri 65101



Dear Mr. Pruitt:

You have asked for an official opinion as to whether Section 290.060, RSMo has been superseded by Title 29 C.F.R., § 1604.2(b). Further, you have referred me to the cases of Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), and Public Utilities Commission of California v. United States, 355 U.S. 534 (1958).

Section 290.060, RSMo, provides:

"It shall be unlawful for any person, firm or corporation to knowingly employ a female or permit a female to be employed in any of the divers kinds of establishments, places of industry, or places of business specified in section 290.040, within three weeks before or three weeks after childbirth. Any person, firm or corporation who shall violate this section shall be deemed guilty of a misdemeanor."

42 U.S.C., § 2000e-2(a), provides:

"(a) Employers. It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

Mr. Edwin Pruitt, Jr.

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

42 U.S.C., § 2000e-12(a), provides:

"(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title [42 USCS §§ 2000e-2000e-17]. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act."

20 C.F.R., § 1604.2(b) (1), provides:

"(b) Effect of sex-oriented State employment legislation.

(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, for more than a specified number of hours per day or per week, and for certain periods of time before and after childbirth. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex. The Commission has concluded that such laws and regulations conflict with and are superseded by title VII of the Civil Rights Act of 1964. Accordingly, such laws will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception."

Mr. Edwin Pruitt, Jr.

We refer you to Attorney General Opinion No. 287, addressed to you, which covered the same issues, i.e., the force and effect of the Code of Federal Regulations and the question of federal supremacy. The reasoning on the question at issue here is the same as that for Opinion No. 287. Section 290.060 has been superseded by Title 29 C.F.R., § 1604.2(b) and 42 U.S.C., § 2000e-2(a).

#### CONCLUSION

It is the opinion of this office that Section 290.060, RSMo, dealing with the employment of pregnant women, has been superseded by 42 U.S.C., § 2000e-2(a) and 29 C.F.R., § 1604.2(b) and employers are no longer required to comply with such statute.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Anne E. Forry.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



TAXATION: Municipalities and school  
ASSESSMENTS: districts lying within a  
TAXATION (SCHOOLS): county in which personal  
TAXATION (CITIES, TOWNS & VILLAGES): property assessment in-  
creased over ten percent  
from the previous year must revise and lower their tax levies  
where said levies were determined and certified to the county  
clerk prior to the increased assessment in accordance with the  
provisions of Section 137.073, RSMo 1969, even though the prop-  
erty assessment in such particular districts or municipalities  
did not increase by ten percent.

OPINION NO. 291

September 18, 1973

Honorable Charles LeCompte  
Prosecuting Attorney  
Greene County, Courthouse  
Springfield, Missouri 65802 .



Dear Mr. LeCompte:

This is in response to your request for an opinion as to whether or not school districts or municipalities in Greene County must lower their rate of levy because of an increase in assessment of personal property in Greene County of over ten percent, even though the assessed valuation of personal property lying within such school districts or municipalities did not increase over ten percent.

Section 137.073, RSMo 1969, provides as follows:

"Whenever the assessed valuation of real or personal property within the county has been increased by ten percent or more over the prior year's valuation, either by an order of the state tax commission or by other action, and such increase is made after the rate of levy has been determined and levied by the county court, city council, school board, township board or other bodies legally authorized to make levies, and certified to the county clerk, then such taxing authorities shall immediately revise and lower the rates of levy to the extent necessary to produce from all taxable property substantially



the same amount of taxes as previously estimated to be produced by the original levy. Where the taxing authority is a school district it shall only be required hereby to revise and lower the rates of levy to the extent necessary to produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy, plus such additional amounts as may be necessary approximately to offset said district's reduction in the apportionment of state school moneys due to its increased valuation. The lower rate of levy shall then be recertified to the county clerk and extended upon the tax books for the current year. The term 'rate of levy' as used herein shall include not only those rates the taxing authorities shall be authorized to levy without a vote, but also those rates which have been or may be authorized by elections for additional or special purposes. No levy for public schools or libraries shall be reduced below a point that would entitle them to participate in state funds."

It is clear from the language of the statute that no exceptions are made for any taxing authority within the county in which property values did not increase by ten percent. It is a well-settled rule of law that a taxing statute must be strictly construed in favor of the taxpayer and against the taxing authority. See, Missouri Pacific Railroad Company v. Kuehle, 482 S.W.2d 505, 509 (Mo. 1972). Therefore, whenever the assessed valuation of real or personal property in the county has been increased by ten percent or more over the previous year's valuation, and such increase is made after the rate of levy has been determined and levied by a taxing authority within the county and certified to the county clerk, such taxing authority must revise and lower its rate of levy to the extent necessary to produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy. With respect to school districts, it is only necessary to lower the rate of levy to the extent necessary to produce from all taxable property within the district substantially the same amount of taxes as previously estimated to be produced by the original levy plus such additional amounts as may be necessary to approximately offset said district's reduction in the apportionment of state school moneys due to its increased valuation, if any. Also, no public school can be required to reduce its levy below a point that would entitle it to participate in state funds.

Honorable Charles LeCompte

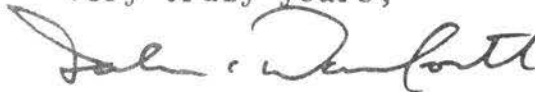
Enclosed for your information are Opinion No. 89 issued July 16, 1970, to Honorable Robert S. Drake, Jr., and Opinion No. 75 issued August 29, 1955, to Honorable John M. Rice, which also deal with Section 137.073. These opinions held that a taxing authority extending into two counties must redetermine its rate of levy when only one of the two counties increased in assessed valuation by more than ten percent. Also, enclosed is Opinion No. 49 issued March 8, 1956, to Honorable J. Marcus Kirtley, which holds that Section 137.073 is brought into operation only where the tax rate has been set prior to the increase of ten percent or more in the assessed valuation of property located in the county.

#### CONCLUSION

It is the opinion of this office that municipalities and school districts lying within a county in which personal property assessment increased over ten percent from the previous year must revise and lower their tax levies where said levies were determined and certified to the county clerk prior to the increased assessment in accordance with the provisions of Section 137.073, RSMo 1969, even though the property assessment in such particular districts or municipalities did not increase by ten percent.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard L. Wieler.

Very truly yours,



JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 89  
7-16-70, Drake  
  
Op. No. 75,  
8-29-55, Rice  
  
Op. No. 49  
3-8-56, Kirtley

December 19, 1973

OPINION LETTER NO. 295  
Answer by Letter - Houdek

Honorable Paul L. Bradshaw  
Missouri Senate, 30th District  
Post Office Box 1035, S.S.S.  
Springfield, Missouri 65805



Dear Senator Bradshaw:

This is in response to your request for an opinion from this office as follows:

"First. Does Article III, Section 12 of the Constitution of Missouri, which prohibits members of the Legislature from 'holding any lucrative office or employment under the United States,' prohibit my sharing in an attorney fee paid to one of my law partners with funds of the government of the United States?

"Second. Does the above cited constitutional provision prohibit my sharing in any attorney fee paid to one of my law partners by an agency of the government of the United States, or by a quasi governmental agency of the United States, so long as the payment does not involve any funds owned by the government of the United States or by any state or municipality?

"Third. In connection with any such fee in which you believe I may not properly share, does the above cited constitutional provision prohibit any such employment by one of my law partners so long as all such fees and expenses are segregated from the other fees and expenses of the law firm, and so long as I personally receive no part whatsoever of any such fee?"

Honorable Paul L. Bradshaw

You further state:

"I am a partner in a law firm and, as such, I normally share in all fees received by any other partner or associate of the firm. One of the other partners has been offered employment as an attorney for the Federal National Mortgage Association and for the Government National Mortgage Association. It is my understanding that at least one of these organizations is a corporation owned by the Federal Government, and that both may involve the total or partial use of federal funds.

"Inasmuch as Article III, Section 12 of the Constitution of Missouri provides that if any Senator or Representative accepts any office or employment under the United States, his office shall thereby be vacated and he shall thereafter perform no duty as Senator, it is necessary for me to know whether the acts described above would be in violation of this provision."

Article III, Section 12 of the Missouri Constitution provides:

"No person holding any lucrative office or employment under the United States, this state or any municipality thereof shall hold the office of senator or representative. When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative. During the term for which he was elected no senator or representative shall accept any appointive office or employment under this state which is created or the emoluments of which are increased during such term. This section shall not apply to members of the organized militia, of the reserve corps and of school boards, and notaries public."

In view of your statement of facts we assume, without deciding, that the organizations involved are agencies of the United States. From the facts stated it is clear that you could not hold

Honorable Paul L. Bradshaw

such employment yourself and we believe that it follows that your partners or associates could not hold such employment.

We enclose herewith Opinion Letter No. 355 issued by this office on October 19, 1969, to the Honorable Ted Salveter, State Representative, District 142, Springfield, Missouri, to the effect that a member of the state legislature cannot represent a state college or other state institution as an attorney without violating the provisions of Article III, Section 12, supra, of the Missouri Constitution. We also enclose Opinion Letter No. 34, directed to you, issued by this office on January 5, 1973, to the effect that a senator or representative who accepts an appointment and receives compensation as an attorney to represent indigent defendants by a court as provided for in House Bill No. 1314, 76th General Assembly, Second Regular Session, violates the provisions of Section 12, Article III of the Constitution of Missouri and that other members of the law firm of which a senator or representative is a member are disqualified from accepting an appointment by the court to represent an indigent defendant and receive compensation under the provisions of such bill.

As we stated in Opinion Letter No. 355 and Opinion Letter No. 34, pursuant to the authority of Supreme Court Rule No. 5.16, the Advisory Committee of the Missouri Bar issued official Opinion No. 91 in which it was stated that "a law firm may not render professional services with regard to any matter which a partner, associate or employee could not properly perform."

It should be borne in mind that unless there is an absolute separation of identity and operation of the persons concerned there remains, irrespective of the separation of fees and expenses, a factual relationship between the legislator-lawyer and the other members of the law firm. Whether or not the firm is "employed" in the premises so as to bring the legislator-lawyer within the prohibition of the Constitution need not be determined. A sound basis for prohibiting such employment of partners, associates or employees, as we have noted, is found in Missouri Bar Advisory Committee Opinion No. 91, which in our view prohibits such employment irrespective of special financial arrangements.

Our answer to your questions is therefore in the negative.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. Ltr. No. 355  
8-19-69, Salveter

LEASES:  
PURCHASING AGENT:

The state may, under Chapter 34, RSMo, negotiate directly for all leases of real estate, and such leases do not have to be bid.

OPINION NO. 300

October 23, 1973



Mr. John A. Cooper, Director  
Division of Design and Construction  
State Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. Cooper:

This is in reply to your request for an opinion on a number of questions concerning the bidding of lease space.

The first question is whether the state is required to bid rental space: (a) at the permanent seat of government, and (b) at places other than at the permanent seat of government.

This office in Opinion No. 88, October 28, 1949, Talley, held that the lease of premises for and in behalf of state departments must be negotiated by the State Purchasing Agent. This would be pursuant to Chapter 34, RSMo.

Section 34.030, RSMo, provides in part:

" . . . The purchasing agent shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the constitution of the state."

Under Section 26.300, RSMo Supp. 1971, the Commissioner of Administration performs the duties of the Purchasing Agent. Accordingly, the Commissioner of Administration shall now negotiate all leases.

Your question implies there may be a difference as to the method of acquiring rental space at the seat of government as opposed to all other places. There is nothing in Chapter 34 or any other statutes which indicate a distinction. Therefore, this question will be the same throughout the state of Missouri.

Thus, Section 34.030 requires the Purchasing Agent to "negotiate" all leases. Section 34.040, RSMo, requires that all purchases shall be based on competitive bids.



Mr. John A. Cooper

The question then is whether the negotiation of leases is included in purchases which must be bid under Section 34.040.

The legislature has defined purchase in Section 34.010.3, RSMo, as follows:

"The term 'purchase' as used in this chapter shall include the rental or leasing of any equipment, articles or things."

This definition relates to personal property by the phrase "equipment, articles or things." The ordinary meaning of these words does not include land or any interest in land.

Section 34.040, after stating that purchase must be made by competitive bid, states in part:

". . . All bids for such supplies shall be mailed or delivered to the office of the purchasing agent so as to reach such office before the time set for opening bids. The contract shall be let to the lowest and best bidder. The purchasing agent shall have the right to reject any or all bids and advertise for new bids, or, with the approval of the governor, purchase the required supplies on the open market if they can be so purchased at a better price. All bids shall be based on standard specifications wherever such specifications have been prepared by the purchasing agent as provided in section 34.050. The purchasing agent shall make rules governing the delivery, inspection, storage and distribution of all supplies so purchased and governing the manner in which all claims for supplies delivered shall be submitted, examined, approved and paid. He shall determine the amount of bond or deposit and the character thereof which shall accompany bids."  
(Emphasis added)

It is apparent here that bids are necessary for purchases of "supplies" which is defined in Section 34.010.4 as follows:

"The term 'supplies' used in this chapter shall be deemed to mean supplies, materials, equipment, contractual services and any and all articles or things, except as in this chapter otherwise provided."



Mr. John A. Cooper

Neither the definition nor the language could mean anything other than personal property or personal services. There is no language to suggest that land is included. In fact the entire chapter is devoted to the purchase of personal property. The only reference to land is in the second sentence of Section 34.030 requiring that the Purchasing Agent negotiate leases and purchase lands. Even here the first sentence of that section requires that the Purchasing Agent shall purchase all supplies, showing an intent to differentiate between personal property and land.

Therefore, it is our opinion that it is not mandatory that leases of land be bid. However, we wish to point out that this does not preclude the bidding of leases if it is determined to be desirable.

You also asked several additional questions which are all based on the answer to the first question being in the affirmative. Since we have held that the state is not required to bid rental space, it is unnecessary to answer these additional questions.

#### CONCLUSION

It is the opinion of this office that the state may, under Chapter 34, RSMo, negotiate directly for all leases of real estate, and such leases do not have to be bid.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,



JOHN C. DANFORTH  
Attorney General



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

November 13, 1973

OPINION LETTER NO. 303

Dr. Arthur L. Mallory  
Commissioner of Education  
State Department of Education  
Jefferson State Office Building  
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This letter is in response to your request for our review and certification of the State Board of Education's State Program for Adult Education under the Adult Education Act of 1970.

Our review has taken into consideration the Adult Education Act of 1970, P.L. 91-230; the Federal regulations applicable to such act (45 C.F.R. part 166; 38 Fed. Reg. 16131 et seq. (June 20, 1973)); Article III, Section 38(a), Article IV, Section 15, and Article IX, Sections 1(b), 2(a) and 2(b), Missouri Constitution; Sections 161.092, 171.096, and 178.430, RSMo 1969; and Section 171.091, C.C.S.H.B. 38, 77th General Assembly, First Regular Session (1973), and related provisions.

It is the opinion of this office:

- (1) That the Missouri State Board of Education is the State Board in the state within the meaning of the Adult Education Act.
- (2) That said Board has the authority under state law to submit a state plan.
- (3) That said Board has authority to administer and supervise the administration of the foregoing state plan.
- (4) That all of the provisions of the foregoing plan are consistent with state law.

Dr. Arthur L. Mallory

(5) That the State Commissioner of Education has been duly authorized by the State Board of Education to submit the foregoing state plan and to represent the Missouri State Board of Education in all matters pertaining thereto.

(6) That the State Treasurer has the authority under state law to receive, hold and disburse Federal funds under the state plan.

In conjunction with this letter opinion which constitutes our official certification of the state plan, we have completed a certification form consistent with this opinion letter.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH  
ATTORNEY GENERAL

September 27, 1973

OPINION LETTER NO. 304

Reuben R. Rhoades, D.D.S.  
Secretary, Missouri Dental Board  
213 Adams Street  
Jefferson City, Missouri 65101

Dear Dr. Rhoades:

This letter is in response to your request for an official opinion from this office as to whether proposed Rule No. 3, A-5 which further defines the services a dental hygienist may render is within the authority of the Missouri Dental Board to promulgate.

Proposed Rule No. 3, A-5 reads as follows:

"A. A registered and currently licensed dentist may delegate to a registered and currently licensed dental hygienist the performance of any procedures or acts to be performed under his supervision, except the following:

\* \* \*

5. Administration of any anesthetic other than a topical, except a hygienist may administer an infiltration anesthetic or perform a soft tissue curettage if she has completed advanced certified training. A hygienist may administer an infiltration anesthetic and perform soft tissue curettage if her employer dentist certifies to the Missouri Dental Board by a notarized statement that she is sufficiently qualified."

Dr. Reuben R. Rhoades

Section 332.091, RSMo 1969, provides:

"Any person 'practices as a dental hygienist' within the meaning of this chapter who under the supervision of a currently registered and licensed dentist, undertakes to or does remove hard and soft deposits from teeth, polishes natural and restored surfaces of teeth, polishes restorations of teeth, performs clinical examinations of teeth and surrounding tissues for diagnosis by a currently licensed and registered dentist, and who performs such other procedures as may be delegated by the employer-dentist in accordance with rules and regulations promulgated by the board."

It is the opinion of this office after reviewing the proposed regulation and the statutory authority conferred on the board by the legislature that proposed Rule No. 3, A-5 is within the authority of the board to promulgate. The purpose of the legislature in enacting the Dental Practice Act was to protect the public from unqualified individuals. The requirements of Rule No. 3, A-5 clearly do not conflict with this purpose since it insures that any hygienist who administers an anesthetic or performs a soft tissue curettage is especially trained in these procedures. Further, it is to be noted that this rule is not in conflict with Section 332.311, RSMo 1969, which requires that a dental hygienist shall only work under the continuous supervision of a duly registered and currently licensed dentist since the employer dentist is responsible for the performance and continuous supervision of these procedures.

By this opinion, this office is not expressing any views on the validity or the authority of the Missouri Dental Board to promulgate any other rule and regulation.

Very truly yours,



JOHN C. DANFORTH  
Attorney General

SHERIFFS: Where the clerk of the magistrate  
MAGISTRATES: court and not the sheriff collects  
MAGISTRATE CLERKS: certain sums of money under amended  
Section 57.130, (Senate Bill No.  
100, 77th General Assembly, effective September 28, 1973), the  
clerk has no authority to collect the ten percent commission  
under subsection 6 of Section 57.290, (Senate Bill No. 516, 76th  
General Assembly).

OPINION NO. 306

October 15, 1973

Honorable Richard T. Martin  
Prosecuting Attorney  
Ozark County  
Post Office Box 161  
Gainesville, Missouri 65655



Dear Mr. Martin:

This opinion is in response to your question asking:

"Section 57.290(6), V.A.M.S. provides for collection of Magistrate costs by the sheriff and that he shall charge ten per cent on the amount of costs. Act 176 of the 77th General Assembly provides that the clerk of the Magistrate court in counties of the fourth class may collect fines and costs, thus under the new act, is the clerk required where all of the money is collected by the clerk, to charge the ten per cent commission required in Section 57.290(6), V.A.M.S.? If so, to what official should the clerk disburse such commission?"

Subsection 6 of Section 57.290, as amended by Senate Bill No. 516 of the 76th General Assembly, relating to sheriffs' fees in criminal cases, provides:

"These costs shall be taxed as other costs in criminal procedure immediately after conviction of any defendant in any criminal procedure. The clerk shall tax all the costs

Honorable Richard T. Martin

in the case against such defendant and deliver a certified copy of the same to the sheriff, who shall immediately proceed to collect such costs from the defendant, together with ten percent on the amount of costs, so collected, as a commission for collecting the same, and the clerk shall receive of such commission an amount equal to ten percent of the fees collected and due such clerk, and the remainder of such commission shall be retained by the sheriff; provided, that in no case shall such commission be taxed against or paid either by the county or the state; provided further, that all costs, incident to the issuing and serving of writs of scire facias and of writs of fieri facias, and of attachments for witnesses of defendant, shall in no case be paid by the state, but such costs incurred under writs of fieri facias and scire facias shall be paid by the defendant and his sureties, and costs for attachments for witnesses shall be paid by such witnesses."

In our enclosed Opinion No. 239, 1973, we concluded that the amendment to Section 57.130, (Senate Bill No. 100, 77th General Assembly, effective September 28, 1973), authorizes the clerks of the magistrate courts of certain counties to collect fines, penalties and forfeitures and other sums of money accruing to the state by virtue of a magistrate court order but requires the sheriffs of such counties to make such collections if the clerks do not do so. In that opinion we also noted (page 2) that it was our view that where the clerk and not the sheriff makes the collections the sheriff is not entitled to the fee under such circumstances. This would be true even though the fee may go to the general revenue of the county if it were collected.

We find no authority for the clerk to charge the commission under subsection 6 of Section 57.290.

#### CONCLUSION

It is the opinion of this office that where the clerk of the magistrate court and not the sheriff collects certain sums of money under amended Section 57.130, (Senate Bill No. 100, 77th



Honorable Richard T. Martin

General Assembly, effective September 28, 1973), the clerk has no authority to collect the ten percent commission under subsection 6 of Section 57.290, (Senate Bill No. 516, 76th General Assembly).

The foregoing opinion, which I hereby approve was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 239  
8-21-73, Fickle

TAXATION (INTANGIBLE): 1974 is the final calendar year during which liability can be incurred for the intangible tax of Chapter 146, RSMo 1969, but this liability is based upon the yield of intangible personal property during 1973 rather than 1974; and the yield of intangible personal property during 1974 will not be the basis for the computation for any future intangible tax. The final date for filing intangible tax returns will be April 15, 1974.

OPINION NO. 308

December 7, 1973

Mr. James R. Spradling, Director  
Missouri Department of Revenue  
Jefferson State Office Building  
Jefferson City, Missouri 65101



Dear Mr. Spradling:

This official opinion is issued in response to your request for a ruling on the following question:

"In view of House Bill 357, Laws 1972, p. [495], which repeals Sections 146.010, 146.020, 146.030, 146.050, 146.080 and 146.120 of the Intangible Personal Property Tax, the repeal to take effect January 1, 1975, is 1973 or 1974 the final calendar year during which liability for the intangible tax can be incurred with the final filing date being April 15, 1974, or April 15, 1975 respectively?"

The answer to your question will depend upon the interpretation of Sections 146.020 and 146.050, RSMo 1969. Section 146.020 states, in pertinent part:

"1. Except as otherwise provided by law, intangible personal property having a taxable situs in the state of Missouri at any time during the calendar year shall be subject to a property tax for the calendar year following the year in which the property had such taxable situs in this state.

"2. The tax on intangible personal property shall be based on the yield of the property during the preceding calendar year, and the rate of tax shall be four percent of such yield."

Mr. James R. Spradling

Section 146.050 states:

"1. Except for the calendar year 1946, every person who, pursuant to any provision of this chapter, is liable for a property tax on intangible personal property, shall on or before April fifteenth of the year for which the property is subject to said tax, file with the department of revenue on a suitable form prepared and distributed by it, a property tax return on intangibles, showing the kind of intangible owned, the amount of yield therefrom and the amount of tax for which he is liable for the year involved.

"2. The tax shall be payable at the time the return is made and shall become delinquent on June first of the year in which it is due."

We would point out that subsection 1 of Section 146.020 imposes a tax on intangible personal property "for" the calendar year following the year in which the property had a taxable situs in Missouri. Subsection 2 states that this tax shall be based on the yield of the property during the preceding calendar year.

The language of subsection 1 of Section 146.050 creates a certain ambiguity in that, while it requires that a return be filed on or before April 15 of the year "for which the property is subject to said tax," it specifies that the taxpayer's return should show ". . . the kind of intangible owned, the amount of yield therefrom and the amount of tax for which he is liable for the year involved." It is not entirely clear from the last quoted passage whether the phrase "for the year involved" means that the return shall show the kind of intangible owned and the amount of yield in the same year for which the tax is owed, or for the preceding year. However, we believe that the latter is the only plausible explanation. If the return is filed no later than April 15 of the same year in which the taxpayer becomes liable for the tax, he cannot possibly describe in that return all the intangible property "having a taxable situs in the state of Missouri at any time" during that year; he will not know whether he may acquire or dispose of intangible personal property during the remainder of the year. Nor can he possibly predict the amount of yield from his intangible personal property for the remainder of the year, for similar reasons. The legislature must have intended in Section 146.050 that the taxpayer's return should show "the amount of tax for which he is liable" for the year in question (the same year in which the return is filed", but show the "kind of intangible owned" and the "amount of yield therefrom" for the preceding year, since this latter information is the basis for the tax in the taxable year.

Mr. James R. Spradling

We would also point out the following language in Section 146.040, subsection 1, RSMo 1969, which was repealed by House Bill No. 357, Laws 1972, page 495:

"Intangible personal property shall be deemed to have a taxable situs in this state for the purpose of being subject to a property tax for the year 1947 and each succeeding year, where, at any time during the calendar year preceding the year for which the property is subject to said tax, the legal title thereto is owned by a person domiciled in this state, . . ."

This language, taken together with that of Section 146.020, very clearly indicates that the tax for which liability is incurred during any given calendar year is in fact the tax for that year, but that the basis on which that tax is to be computed is to be derived from the preceding year.

In the immediate context of your question, it is obvious that the repeal of Section 146.020 as of January 1, 1975, will not prevent the imposition of intangible personal property taxes for the year 1974. But the taxes for that year 1974 will be based upon the 1973 yields on intangible personal property which had a taxable situs in Missouri during 1973. The filing date for 1974 tax will be April 15, 1974.

Our conclusions are supported by the decision of the Supreme Court of Missouri in the case of In re Armistead, 245 S.W.2d 145 (Mo. 1952). That case held that the intangible tax act could not be applied for the calendar year 1947 so as to assess the tax on the basis of the yield of intangible personal property for the entire calendar year 1946, because the act did not become operative until July 1, 1946. The court held that such application of the act would make it "retrospective in its operation" and therefore in violation of Article I, Section 13 of the Constitution of Missouri of 1945. In so holding, however, the court cited and quoted from its opinion in First Nat. Bank of St. Joseph v. Buchanan County, 205 S.W.2d 726 (Mo. 1947), a case in which involved similar provisions in the Bank Tax Act of 1946 (now Sections 148.010-148.110, RSMo 1969):

". . . That act, like the intangible personal property tax act, became operative July 1, 1946. It levied an annual tax for calendar 1947, 'measured by the taxpayer's net income for' calendar 1946. We said: 'For the tax year 1947 and thereafter the tax is to be measured by the taxpayer's income "for the preceding calendar year," or year 1946. . . .'

Mr. James R. Spradling

Even though a tax to be assessed and collected in one year on the income of the preceding year "is a tax for the year of its collection, and not for the year in which the income was received" (61 C.J. Sec. 2331, p. 1581), the tax imposed by the Bank Tax Act, however it is viewed, is retrospective in its operation and could not be effective in the circumstances of this case and in any event prior to July 1, 1946.  
(Emphasis added) In re Armistead, supra at 152.

It should be clear from the above-quoted passage that the intangible property tax is a tax for the year of its collection, not for the year by which the yield of the taxpayer's intangible property is measured. Thus, the last year for which the intangible property tax may be imposed will be 1974; but the last year in which the yield on intangible personal property will be the measuring rod for the assessment of future intangible tax will be 1973.

#### CONCLUSION

Therefore, it is the opinion of this office that 1974 is the final calendar year during which liability can be incurred for the intangible tax of Chapter 146, RSMo 1969, but this liability is based upon the yield of intangible personal property during 1973 rather than 1974; and the yield of intangible personal property during 1974 will not be the basis for the computation for any future intangible tax. The final date for filing intangible tax returns will be April 15, 1974.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Yours very truly,



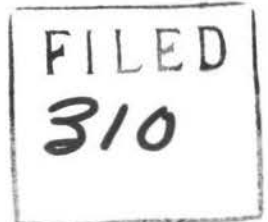
JOHN C. DANFORTH  
Attorney General

APPROPRIATIONS: Payments for children who have been  
ADOPTED CHILDREN: adopted and for whom foster care pay-  
FOSTER HOME CARE: ments have been paid under the homeless,  
DIVISION OF WELFARE: dependent, and neglected foster care  
program of the state of Missouri cannot  
be made from the funds appropriated for payment of the state's  
share of the cost of family foster home care of homeless, depen-  
dent or neglected children.

OPINION NO. 310

December 14, 1973

Mr Bert Shulimson, Director  
Missouri Division of Welfare  
Broadway State Office Building  
Jefferson City, Missouri 65101



Dear Mr. Shulimson:

This opinion is issued in response to your request for an official Attorney General's opinion regarding a particular provision of House Bill No. 254, 77th General Assembly. Your question reads as follows:

"In regard to House Bill 254, 77th General Assembly, repealing and re-enacting Section 453.070, RS Mo 1969, relating to adoptions.

- (1) Our question resolves itself around the legality of making the payments as required in House Bill 254, to subsidize the family of an adopted child as provided by said bill, in light of the following factors:
  - (a) The funds for foster home care for homeless, dependent, or neglected children are provided in two specific line items, in House Committee Substitute for House Bill 6 of the 77th General Assembly, Sections 6.350 and 6.360, pages 9 and 10 of said bill.
  - (b) By this bill, does not the subsidized foster child lose



Mr. Bert Shulimson

the status of a foster child and therefore become ineligible for payments from this specific line item fund? If the foster child does lose the status of a foster child, would it not be an illegal payment, under Article 4, Section 28, Constitution of Missouri, 1945."

House Committee Substitute for House Bill No. 6, 77th General Assembly, provides there is appropriated out of the state treasury, chargeable to the funds for the agency and purpose designated, for the period beginning July 1, 1973, and ending June 30, 1974, as follows:

"Section 6.350. To the Division of Welfare

To reimburse counties of the first class, certain counties of the second class and the City of St. Louis the State's share of the cost of family foster home care to homeless, dependent, or neglected children as provided by law

From General Revenue . . . . . \$946,000

"Section 6.360. To the Division of Welfare

To reimburse counties of the second, third and fourth class the State's share of the cost of family foster home care to homeless, dependent, or neglected children as provided by law

From General Revenue . . . . . \$856,300"

House Bill No. 254, 77th General Assembly, repealed Section 453.070, RSMo 1969, and enacted two new sections in lieu thereof to be known as Sections 453.070 and 453.085 relating to adoption of minor children. Section 453.070, subdivision 1, provides in part that no decree for adoption of a minor child shall be entered until a full investigation has been made of the physical and mental condition of such child for the purpose of ascertaining whether the child is suitable for adoption.



Mr. Bert Shulimson

Section 453.085(1) defines and describes various forms of allotments and subsidies and their purposes. Section 453.085(2) provides:

"2. The juvenile court is authorized to subsidize the family of an adopted child in one of the aforementioned forms of allotment. The subsidy shall not exceed the expenses of foster care and medical care for foster children paid under the homeless, dependent and neglected foster care program of the division of welfare, of the department of public health and welfare of the state of Missouri. The subsidy shall be paid only for the same children for whom foster care payments have been paid under the homeless, dependent and neglected foster care program of the division of welfare of the department of public health and welfare of the state of Missouri and the subsidy shall be paid in the same manner and from the same funds as foster care payments. This authorization shall pertain to those children previously considered unadoptable; those suffering from physical handicaps or mental retardation or those children belonging to minority racial and ethnic groups for whom adoptive homes are not readily available." (Emphasis added)

Your question asks whether a child adopted under the provisions of Section 453.085 loses its status as a foster child, and if so, whether a payment to the family of such adopted child from the appropriation of HCSHB No. 6 would violate Article IV, Section 28, Constitution of Missouri.

Article IV, Section 28, Constitution of Missouri, provides in pertinent part, as follows:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for that payment of money be incurred unless the commissioner of administration certifies it for payment and certifies that the expenditure is within the purpose as directed by the general assembly of the appropriation . . ."

Mr. Bert Shulimson

Under the above-constitutional provision, then, no money shall be withdrawn from the state treasury unless the expenditure is within the purpose of a specific appropriation act.

Article IV, Section 23, Constitution of Missouri provides, in pertinent part, as follows:

" . . . Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."

Sections 6.350 and 6.360 of HCSHB No. 6 provide for an appropriation to reimburse counties for the state's share of the cost of family foster home care to homeless, dependent or neglected children as provided by law.

Although the term "family foster care" is not defined in Section 453.070 as reenacted, an analysis of Sections 207.020 and 210.292 indicates that as the term is used in the statutes it means care for homeless, dependent, and neglected children whose custody is in the Division of Welfare.

Section 207.020, defining the powers, duties, and functions vested in the Division of Welfare, authorizes it to accept for social services and care " . . . homeless, dependent or neglected children in second, third and fourth class counties whose legal custody is vested in the division of welfare by the juvenile court; . . ." and further provides that the cost shall be paid jointly by the county and the Division of Welfare.

Family foster home care in class one counties, the City of St. Louis, and Clay County is provided for in Sections 210.292 to 210.298, RSMo 1969. Section 210.292(2) provides as follows:

"2. The 'family foster home care' provided for by sections 210.292 to 210.298 shall be home care of homeless, dependent and neglected children when the family foster homes are selected by the local agency or division of welfare and the placement of children therein is lawfully authorized; the 'care' shall include room, board, clothing, medical care, dental care and incidentals."

Clearly, once a child has been adopted it is no longer "homeless, dependent or neglected." Nor does his legal custody remain vested in the Division of Welfare. In addition, the language of

Mr. Bert Shulimson

Section 453.085, particularly paragraph 2, indicates a legislative recognition of a distinction between family foster home care and care by the family of a newly adopted child. Indeed, if such a distinction did not exist, there would have been little need to have repealed and reenacted Section 453.070.

In any event, in construing statutes, words are to be given their plain or ordinary or usual meaning. State v. Brady, 472 S.W.2d 356 (Mo. 1971). And it is obvious that the plain or ordinary meaning of the term "foster home care" does not include adoptive home care.

Furthermore, it is a well-accepted rule of statutory construction that appropriation acts are to be strictly constructed. Meyers v. Kansas City, 18 S.W.2d 900 (Mo. banc 1929); State v. Weatherby, 168 S.W.2d 1048 (Mo. banc 1943).

Consequently, it is clear that payments to the families of adoptive children are not within the purview of Sections 6.350 and 6.360, which earmark moneys specifically for "family foster home care to homeless, dependent or neglected children . . . ."

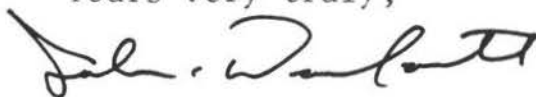
Therefore payments for adopted children under Section 453.085(2) cannot be made from moneys appropriated by Sections 6.350 and 6.360 of House Bill No. 6 because such payments are prohibited by the Missouri Constitution.

#### CONCLUSION

It is the opinion of this office that payments for children who have been adopted and for whom foster care payments have been paid under the homeless, dependent, and neglected foster care program of the state of Missouri cannot be made from the funds appropriated for payment of the state's share of the cost of family foster home care of homeless, dependent or neglected children.

The foregoing opinion, which I hereby certify, was prepared by my assistant, Philip M. Koppe.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

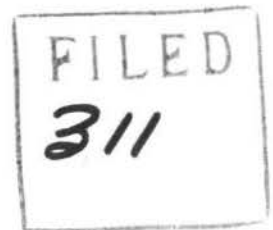
COURT RECORDS:  
PUBLIC RECORDS:  
SUNSHINE BILL:

With respect to Act 172, 77th General Assembly that: 1. Section 7 of the Act applies to all records of prosecuting attorneys, law enforcement agencies, and magistrate courts which pertain to the case of a person who has been arrested and charged. 2. Records required to be closed under Section 7 of the Act are not to be expunged, but they are available to courts and law enforcement agencies only for purposes of litigation and otherwise must be inaccessible to the general public.

OPINION NO. 311

November 30, 1973

Honorable Ralph L. Martin  
Prosecuting Attorney  
Jackson County Courthouse  
415 East 12th Street  
Kansas City, Missouri 64106



Dear Mr. Martin:

This official opinion is issued in response to your request for a ruling on the following question:

"Section 7 of the Act 172, First Regular Session-1973, refers to 'official records pertaining to the case' which shall be 'closed records' following a dismissal or finding of not guilty.

1. Which records are covered by the section of:

- a. The Magistrate Courts.
- b. The Prosecuting Attorney.
- c. Law enforcement agencies.

2. What is covered by the word 'closed?' For example, does it require complete expunging? Or physical separation from public records?"

As you noted in your opinion request, this Act became effective on September 28, 1973; and, as you stated, "... The originating law enforcement agencies, the Prosecuting Attorneys and the Courts involved, all maintain records of their investigations and proceedings. . . ."

The statute in question reads, in pertinent part, as follows:

"Section 7. If the person arrested is charged but the case is subsequently nolle prossed,

Honorable Ralph L. Martin

dismissed or the accused is found not guilty in the court in which the action is prosecuted, official records pertaining to the case shall thereafter be closed records to all persons except the person arrested or charged."

We answer your questions as follows:

1. We would point out that, while the statute as a whole refers to "public records," the section in question speaks of "official records." "Official records" are not defined in the statute. "Public records," however, are defined in Section 1(3) as "any record retained by or of any public governmental body," and "public governmental body" is defined in Section 1(1) as:

". . . Any constitutional or statutory governmental entity, including any state body, agency, board, bureau, commission, committee, department, division, or any political subdivision of the state, of any county or of any municipal government, school district or special purpose district, and any other governmental deliberative body under the direction of three or more elected or appointed members having rulemaking or quasi-judicial power;"

It is our opinion, however, that the legislature intended "official records" in the context of Section 7 to encompass all the same categories of records included in the term "public records" with which the rest of the statute is concerned.

Missouri courts have in the past used the terms "official records" and "public records" interchangeably. See State ex rel. Eggers v. Brown, 134 S.W.2d 28 (Mo. banc 1939). We find no indication in the Act that the General Assembly intended the term "official records" to have any meaning other than "public records," and we believe that in fact the terms mean the same thing.

Initially, we note that Section 7 deals with situations in which a person has already been "charged." In our Opinion No. 299, issued September 28, 1973, to Theodore D. McNeal and Curtis Broston (copy of which is attached hereto), we defined the term "charged with an offense" in the context of Section 6 of the Act to mean that the judicial process has been invoked against an arrested person by either (a) the issuance of a warrant or (b) the returning of an indictment or (c) the filing of a prosecuting attorney's felony complaint or (d) in misdemeanor cases, the filing of an information against the arrested person. We believe the term has the same meaning in Section 7 as in Section 6. Section 7, therefore,



Honorable Ralph L. Martin

refers to situations in which, after the judicial process has been invoked, the matter is resolved favorably to the arrested person, i.e., the case instituted by the charge is ". . . nolle prossed, dismissed or the accused is found not guilty in the court in which the action is prosecuted, . . ." We would point out that all these dispositions must necessarily occur after other matters of record have already occurred in the courts.

We note that, since the legislature intended "official records" in Section 7 to be identical in meaning to "public records" as used elsewhere in the Act, it is required that the records of courts, prosecuting attorneys, and law enforcement agencies be closed upon nolle prosequi, dismissal or a finding of not guilty in the court in which the action is prosecuted, since all these agencies are certainly "constitutional or statutory governmental entities" and therefore "public governmental bodies" whose records are "public records."

We conclude, therefore, that the legislature intended to include court records as "official records" within the scope of Section 7 of the Act. Thus the records of magistrate courts are covered by this section, as are the records of prosecuting attorneys or of other law enforcement agencies. However, the classes of records covered by Section 7 are somewhat more inclusive than those comprehended by Section 6. As we explained in our Opinion No. 299, Section 6 applies to all records of arrests and of any detention or confinement incident thereto, of whatever nature, which are maintained as the records of public governmental bodies, and not merely to the formal arrest records maintained by the arresting agency; but Section 7 appears to apply to all records pertaining to the case, and is not limited to records of arrest, detention, and confinement.

2. In our Opinion No. 299, we stated that the words "closed to all persons" in Section 6 of the Act meant that the records affected by that language remained available to law enforcement agencies only for purposes of litigation, and otherwise must be closed to all persons--that is, that they must not be accessible to the general public. We also noted that closing is a less stringent requirement than expungement. We believe that these principles are equally applicable to the language of Section 7 of the Act. Complete expungement, i.e., destruction of the records closed under Section 7 is not required. However, the records may be used by law enforcement agencies and courts only for purposes of litigation and may not be made accessible to the general public.

#### CONCLUSION

Therefore, it is the opinion of this office with respect to Act 172, 77th General Assembly, that:

Honorable Ralph L. Martin

1. Section 7 of the Act applies to all records of prosecuting attorneys, law enforcement agencies, and magistrate courts which pertain to the case of a person who has been arrested and charged.

2. Records required to be closed under Section 7 of the Act are not to be expunged, but they are available to courts and law enforcement agencies only for purposes of litigation and otherwise must be inaccessible to the general public.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 299  
9-28-73, McNeal



FINES: Article IX, Section 7 of the Con-  
COUNTRIES: stitution of Missouri prohibits the  
CRIMINAL LAW: passage of state statutes which  
CITY ORDINANCES: would allocate to the training of  
COUNTY ORDINANCES: law enforcement personnel any funds  
CONSTITUTIONAL LAW: collected as fines for the violation  
CITIES, TOWNS & VILLAGES: of state laws. However, there is no  
constitutional prohibition against  
the passage of state statutes (or county or municipal ordinances,  
in the absence of such state statutes) which would mandate alloca-  
tions to the training of law enforcement personnel from funds col-  
lected as fines for the violation of county or municipal ordinances.

OPINION NO. 312

December 17, 1973



Honorable Donald L. Manford  
State Senator, District 8  
Room 425, Capitol Building  
Jefferson City, Missouri 65101

Dear Senator Manford:

This official opinion is issued in response to your request  
for a ruling on the following question:

"Is there any constitutional prohibition  
against the passage of state statutes or/and  
passage of municipal-county ordinances direct-  
ing funds collected from traffic and other  
fines [to] be used exclusively for training  
of law enforcement personnel within the par-  
ticular jurisdiction?"

You have stated an interest in introducing enabling legisla-  
tion to this end.

We direct your attention to Article IX, Section 7 of the Con-  
stitution of Missouri. That section states:

"All real estate, loans and investments now  
belonging to the various county and township  
school funds, except those invested as herein-  
after provided, shall be liquidated without  
extension of time, and the proceeds thereof  
and the money on hand now belonging to said

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school funds of the several counties and the city of St. Louis, shall be reinvested in registered bonds of the United States, or in bonds of the state or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which are fully guaranteed by the United States, and sacredly preserved as a county school fund. Any county or the city of St. Louis by a majority vote of the qualified electors voting thereon may elect to distribute annually to its schools the proceeds of the liquidated school fund, at the time and in the manner prescribed by law. All interest accruing from investment of the county school fund, the clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the state, the net proceeds from the sale of estrays, and all other moneys coming into said funds shall be distributed annually to the schools of the several counties according to law." (Emphasis added)

It has been held that this constitutional provision applies only to such fines as constitute criminal rather than civil penalties; that is, fines paid in satisfaction of a public rather than a private wrong. New Franklin School Dist. No. 28, Howard County v. Bates, 225 S.W.2d 769 (Mo. 1950); State ex rel. Rodes v. Warner, 94 S.W. 962 (Mo. banc 1906).

This constitutional provision would appear to prohibit the enactment of state statutes directing that fines for offenses against state law be allocated for any purpose other than county school funds. (The actual process of distribution to such funds is governed by Sections 166.131 through 166.171, RSMo 1969.)

However, where county or municipal ordinances rather than state laws are involved, it appears that fines collected for violations of such ordinances need not be distributed to county school funds. In the case of Automobile Club of Missouri v. City of St. Louis, 334 S.W.2d 355 (Mo. 1960), the plaintiffs had contended that revenue from fines for violation of the parking meter ordinance of the City of St. Louis could not be transferred into a parking meter fund for the administration of the ordinance. The court, however, refused to strike down such allocation of the revenue from those fines. We therefore see no constitutional barrier to the enactment of municipal or county ordinances which provide for the distribution of fines, collected for violations of such municipality's or such county's ordinances, for a public purpose such as the training of law enforcement personnel.

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But it is also clear that the General Assembly has the power to prescribe the disposition and control of municipal or county revenues from fines and penalties collected for ordinance violations. See McQuillin Municipal Corporations (3rd Ed.), Section 4.142; Watson Seminary v. Pike County Court, 50 S.W. 880 (Mo. 1899). This power exists even with respect to constitutional charter counties and cities and, if exercised, takes precedence over the counties' and cities' power in this field.

Article VI, Section 18(b) of the Constitution of Missouri of 1945 provides that the charter of a charter county shall:

" . . . provide for its amendment, for the form of the county government, the number, kinds, manner of selection, terms of office and salaries of the county officers, and for the exercise of all powers and duties of counties and county officers prescribed by the constitution and laws of the state." (Emphasis added)

A constitutional limitation on the legislative power with respect to constitutional charter counties is found in Article VI, Section 18(e):

"Laws shall be enacted providing for free and open elections in such counties, and laws may be enacted providing the number and salaries of the judicial officers therein as provided by this constitution and by law, but no law shall provide for any other office or employee of the county or fix the salary of any of its officers or employees."

As was stated in State ex rel. O'Brien v. Roos, 397 S.W.2d 578, 582 (Mo. 1965), ". . . A county, after adopting a constitutional provision giving it exclusive control of local matters, continues amenable to state control in matters of a public character . . ." There is no express constitutional limitation on the state's legislative power to direct the disposition of funds collected by charter counties as fines for the violation of ordinances, and we believe that no such limitation is implicit in Article VI, Section 18(b), nor implicit elsewhere in the Constitution of Missouri.

A similar logic applies to constitutional charter cities, to which Article VI, Section 19(a), as amended, grants:

" . . . all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are

Honorable Donald L. Manford

consistent with the Constitution of this State and are not limited or denied either by the charter . . . or by statute. . ." (Emphasis added)

The only express constitutional limitations on legislative power with respect to charter cities are found in Article VI, Section 22:

"No law shall be enacted creating or fixing the powers, duties or compensation of any municipal office or employment, for any city framing or adopting its own charter under this or any previous constitution, and all such offices or employments heretofore created shall cease at the end of the terms of any present incumbents."

This language does not limit the legislative power to prescribe the disposition of funds collected by charter cities as fines for ordinance violations.

On the other hand, in the absence of any controlling state legislation, a county or a municipality would remain free to provide for the disposition of funds collected as fines for violations of its ordinances, as indicated above.

#### CONCLUSION

Therefore, it is the opinion of this office that Article IX, Section 7 of the Constitution of Missouri prohibits the passage of state statutes which would allocate to the training of law enforcement personnel any funds collected as fines for the violation of state laws. However, there is no constitutional prohibition against the passage of state statutes (or county or municipal ordinances, in the absence of such state statutes) which would mandate allocations to the training of law enforcement personnel from funds collected as fines for the violation of county or municipal ordinances.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

LEGISLATORS:

A state representative may not be employed to produce an annual report for the Land Clearance for Redevelopment Authority of the City of Springfield, because such employment violates Article III, Section 12 of the Constitution of Missouri.

OPINION NO. 317

October 23, 1973



Honorable Gerald L. Durnell  
Representative, District 149  
825 East Portland  
Springfield, Missouri 65807

Dear Representative Durnell:

This official opinion is issued in response to your request for a ruling on the following question:

"Whether a conflict of interest or dual employment, under Article III section 12 of the Missouri State constitution exists in regard to a production contract for an Annual Report from the Springfield office of Urban Renewal, (a federal agency established as a body, public, corporate, and politic) awarded to my advertising firm, . . ."

You state that the "Urban Renewal" agency in question is in fact the Land Clearance for Redevelopment Authority of the City of Springfield. It is our understanding that this agency was created by ordinance of the city council of Springfield pursuant to Sections 99.300 to 99.660, RSMo. You have also stated that your firm, which is a sole proprietorship, submitted bids to this agency for production of its 1973 annual report, and subsequently you were notified that your firm had been selected to produce that report.

Article III, Section 12 of the Constitution of Missouri of 1945 states as follows:

"No person holding any lucrative office or employment under the United States, this state or any municipality thereof shall hold the office of senator or representative. When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby



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be vacated and he shall thereafter perform no duty and receive no salary as senator or representative. . . ."

We have interpreted this provision of the Constitution on a number of occasions, most recently in our Opinion No. 34, issued January 5, 1973, to the Honorable Paul L. Bradshaw. A copy of that opinion is attached hereto. We held there that a senator or representative who accepts an appointment by a court and receives compensation as an attorney to represent indigent defendants violates the constitutional provision. In our Opinion Letter No. 355, issued August 19, 1969, to the Honorable Ted Salveter (copy of which is also attached hereto), we held that a member of the General Assembly could not serve as an attorney for a state college or other state institution, and noted the following:

"The term 'employment' is subject to a variety of legal interpretations depending upon the context in which it arises. Since the purpose of Article III, Section 12 appears to be to prevent the potential conflicts of interest which would arise if a senator or representative were to have other duties with respect to other governmental bodies, we are of the opinion that a broad interpretation of the word 'employment' is called for when construing that section."

In St. Louis Housing Authority v. City of St. Louis, 239 S.W. 2d 289 (Mo. banc 1951), it was held that the city's housing authority was a "municipality." The court stated, at 294, that:

". . . Municipality now has a broader meaning than 'city' or 'town', and presently includes bodies public or essentially governmental in character and function. . . ."

We believe that the same principles apply to make the Land Clearance for Redevelopment Authority of the City of Springfield a "municipality" within the scope of Article III, Section 12 of the Constitution of Missouri of 1945.

In the instant situation, we believe that performance of a contract to produce the report to which you refer, for which you would receive compensation from the Land Clearance for Redevelopment Authority of the City of Springfield, would constitute "employment" within the meaning of Article III, Section 12 of the Constitution of Missouri of 1945, and therefore that a state representative may not accept such employment.

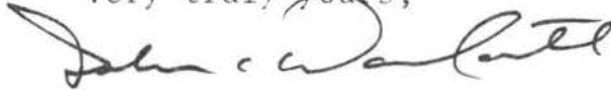
Honorable Gerald L. Durnell

CONCLUSION

Therefore, it is the opinion of this office that a state representative may not be employed to produce an annual report for the Land Clearance for Redevelopment Authority of the City of Springfield, because such employment violates Article III, Section 12 of the Constitution of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

Attachments: Op. No. 34  
1-5-73, Bradshaw  
  
Op. Ltr. No. 355  
8-19-69, Salveter



ARREST:  
CRIMINAL PROCEDURE:  
PUBLIC RECORDS:

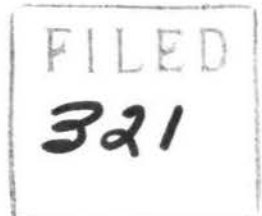
With respect to Sections 6, 7 and  
8 of Senate Bill No. 1, 77th General  
Assembly, relating to arrest records,  
1. The provisions of the first sen-

tence of Section 6 and the provisions of Section 7, relating to the closing of records of arrested persons, apply throughout the state of Missouri. 2. The second sentence of Section 6, relating to expungement of records of arrested persons, applies to all records, wherever maintained, of arrests which take place within the geographical confines of any city or county having a population of five hundred thousand or more. 3. Section 6 of the Act does not require closing of the records of an arrest if that arrest results in any criminal charge against the arrested person within thirty days. 4. Under Section 7 of the Act, official records need not be closed unless all charges arising out of an arrest are subsequently nolle prossed, dismissed, or result in findings of not guilty. 5. Section 7 of the Act requires that official records be closed where the original indictment or information against the accused is dismissed and an information charging the accused with a different offense is subsequently filed, but does not apply where an amended information is filed charging the same offense as previously charged by indictment or information.

OPINION NO. 321

December 10, 1973

Colonel Samuel S. Smith  
Superintendent  
Missouri State Highway Patrol  
1510 East Elm  
Jefferson City, Missouri 65101



Dear Colonel Smith:

This opinion is issued in response to your request for a ruling on the following questions pertaining to Sections 6, 7 and 8 of Senate Bill No. 1, 77th General Assembly (1973):

"1. Does the act apply to all arresting agencies in the state with respect to closing of records in Section 6 and 7, or to those in 'any city or county having a population of 500,000 or more'?

"2. Does the language 'in any city or county having a population of 500,000 or more' refer to records of all agencies physically located in such city or county, all records of arrests

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which take place in such city or county (wherever such records may be kept), or merely to records of arrests by such city's or county's own law enforcement agencies?

"3. If a person is arrested for more than one alleged offense, but he is only charged with one offense, does Section 6 require that the records of that arrest be closed insofar as they pertain to the offenses for which there are no charges?

"4. If a single arrest results in more than one charge being filed, but one such charge is subsequently nolle prossed, dismissed, or results in a finding of not guilty in the court in which the action is prosecuted, must official records pertaining to any or all of the charges be closed?

"5. Does the word 'dismissed' in Section 7 apply to situations in which a person is charged by one indictment or information, but another information is later substituted for the original charge (either for the same or a different offense)?"

The statute in question reads, in pertinent part, as follows:

"Section 6. If any person is arrested and not charged with an offense against the law within thirty days of his arrest, all records of the arrest and of any detention or confinement incident thereto shall thereafter be closed records to all persons except the person arrested. If there is no conviction within one year after the records are closed, all records of the arrest and of any detention or confinement incident thereto shall be expunged in any city or county having a population of five hundred thousand or more.

"Section 7. If the person arrested is charged but the case is subsequently nolle prossed, dismissed or the accused is found not guilty in the court in which the action is prosecuted, official records pertaining to the case shall thereafter be closed records to all persons except the person arrested or charged,

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"Section 8. No person as to whom such records have become closed records or as to whom such records have been expunged shall thereafter under any provision of law be held to be guilty of perjury or otherwise of giving a false statement by reason of his failure to recite or acknowledge such arrest or trial in response to any inquiry made of him for any purpose."

We answer your questions in the order in which you have asked them:

1.

It is clear that the second sentence of Section 6 of the Act, relating to expungement of arrest records when no conviction has taken place within one year after such records have been closed, applies only "in any city or county having a population of five hundred thousand or more." However, we believe that the first sentence of Section 6, requiring the closing of arrest records where an arrested person is not charged with an offense within thirty days of arrest, and the provisions of Section 7, requiring the closing of records where a person is arrested and charged but the case subsequently nolle prossed, dismissed, or the accused found not guilty in the court in which the action is prosecuted, apply throughout the state of Missouri.

We reach this conclusion from the manner in which Section 6 is phrased. The words "in any city or county having a population of five hundred thousand or more" appear only in the last sentence of that section. We believe that the only fair construction of this syntax is that the clause applies only to the subject matter of the sentence in which it does appear. This conclusion is strengthened by the fact that the expungement provision of the second sentence of Section 6 applies only to records which have already been closed under the self-sufficient language of the first sentence. And Section 7 makes no mention at all of "any city or county having a population of five hundred thousand or more", nor does it make any reference to the provisions of Section 6. Furthermore, we would point out that Senate Bill No. 1, taken as a whole, does not purport to apply only to cities or counties having a population of five hundred thousand or more.

In Missouri Public Service Company v. Platte-Clay Electric Cooperative, Inc., 407 S.W.2d 883, 891 (Mo. 1966), it was stated that:

". . . 'Provisions not found plainly written or necessarily implied from what is written

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"will not be imported or interpolated therein in order that the existence of [a] right may be made to appear when otherwise, upon the face of [the statutes], it would not appear." Allen v. St. Louis-San Francisco Ry. Co., 338 Mo. 395, 402, 90 S.W.2d 1050, 1053, 105 A.L.R. 1222, cited with approval in State ex rel. Mills v. Allen, 344 Mo. 743, 128 S.W.2d 1040, 1043.' . . . We are enjoined by § 1.090 to take words and phrases in their plain or ordinary and usual sense. In Marty v. State Tax Commission of Missouri, Mo.Sup., 336 S.W.2d 696, we approved the rule that the legislative intent should be ascertained from the words used, if possible, and that the plain and rational meaning of language should be ascribed to it. . . . 'We are guided by what the legislature says, and not by what we may think it meant to say.' United Air Lines, Inc. v. State Tax Commission, Mo.Sup., 377 S.W.2d 444, 448."

Under these principles, we are unable to conclude that the legislature intended the first sentence of Section 6 or the provisions of Section 7 of the Act to apply only to any city or county having a population of five hundred thousand or more. Rather, they apply generally throughout Missouri.

2.

To determine the legislature's intent in the second sentence of Section 6 of the Act, where appear the words "all records of the arrest and of any detention or confinement incident thereto shall be expunged in any city or county having a population of five hundred thousand or more", we would refer to the general principles of statutory construction stated in Graves v. Little Tarkio Drainage Dist. No. 1, 134 S.W.2d 70, 78 (Mo. 1939):

". . . 'It is an elementary and cardinal rule of construction that effect must be given, if possible, to every word, clause, sentence, paragraph, and section of a statute, and a statute should be so construed that effect may be given to all its provisions, so that no part, or section, will be inoperative, superfluous, contradictory, or conflicting, and so that one section, or part, will not destroy another. Sutherland on Statutory Construction (2d Ed.) 731, 732, § 380. Moreover, it is presumed that the Legislature

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intended every part and section of such a statute, or law, to have effect and to be operative, and did not intend any part or section of such statute to be without meaning or effect.' . . ."

We do not believe that the language of the Act requires expungement only of records maintained by agencies of the municipal entities mentioned specifically in the statute: "any city or county having a population of five hundred thousand or more". Had the statute said that the records shall be expunged "by" any such city or county, our conclusion might be different. The word "in", however, implies that the scope of the provision is geographical.

It should be evident that many records of arrests which take place geographically within the limits of such cities or counties, and many arrest records which are physically maintained within the geographical boundaries of such cities or counties, will not be the records of agencies of such cities or counties. State agencies, such as the State Highway Patrol, may possess such records, as may agencies of municipalities which are physically located in counties of more than five hundred thousand population but which do not have a population of five hundred thousand themselves. Frequently arrest records will be maintained both by agencies of a city or county having a population of five hundred thousand and by agencies of other governmental entities. It would be superfluous and contradictory to require that some of these agencies expunge their records, while others are not required to do so, and we do not attribute such an intention to the legislature. In the absence of clear legislative prescription, we are unable to conclude that the expungement requirement applies only to agencies of "any city or county having a population of five hundred thousand or more." The plain meaning of the words of the statute implies a geographical application, not one based upon the nature of the governmental entity possessing the records.

There are two possible interpretations of the language in question. Either all arrest records physically maintained "in any city or county having a population of five hundred thousand or more" are subject to expungement--wherever the arrests took place--or else all records of arrests which took place "in any city or county having a population of five hundred thousand or more" are subject to expungement--wherever the records may be maintained within the state of Missouri. We believe the latter is the correct interpretation.

If an arrest takes place outside a city or county having a population of five hundred thousand or more, some records of it



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will certainly exist in the locality where the arrest was made. But the statute would be superfluous if it required records of such an arrest to be expunged only within a city or county having a population of five hundred thousand or more, without authorizing their expungement elsewhere. On the other hand, no such contradiction will arise if the statute authorizes expungement of all records of the arrests which its provisions comprehend.

We must conclude that the legislature intended the statutory provision to have a consistent and not a contradictory meaning. We conclude, therefore, that all records of arrests which take place in any city or county having a population of five hundred thousand or more are subject to expungement, regardless of where or by what agency they may be maintained in the state of Missouri.

3.

The first sentence of Section 6 of the Act requires closing of records of "arrests and of any detention or confinement incident thereto" only if the arrested person is "not charged with an offense against the law within thirty days of his arrest." The term "an offense" would appear to refer to any offense. We note that the records to be closed are described in terms of the arrest and detention, not the reasons which may underlie the arrest. See our Opinion No. 299, issued September 28, 1973, to Theodore D. McNeal and Curtis Brostron, a copy of which is attached hereto.

4.

We note that Senate Bill No. 1 does not define the term "the case" which it employs in Section 7 to refer to situations where a person has been arrested and charged. "Case" has been defined in various ways, depending on its context. The definition which appears most appropriate in the context of Section 7 of the Act was quoted from Black's Law Dictionary in Barnett v. Pemiscot County Court, 86 S.W. 575, 576 (St.L.Ct.App. 1905): "' . . . It imports a state of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice. In its generic sense, the word includes all causes, special or otherwise.' . . . " A similar definition was set forth in Hancock v. Schroering, 481 S.W.2d 57, 60 (Ky. 1972): "' . . . 'a set of circumstances or conditions' or 'a situation requiring investigation or action by the police or other agency,' or 'the object of investigation or consideration.' . . . "

The term "charged" as used in Section 7 appears to have the same meaning as in Section 6. As we indicated above, the phrase "charged with an offense against the law" in Section 6 refers to a charge for any offense. Thus, "charged" in Section 7 would seem

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to refer to whatever offense or offenses had been charged; and "the case" would seem to indicate the entire range of criminal proceedings arising from the arrest. Moreover, we would point out Section 1.030, subsection 2, RSMo 1969, which provides that "When any subject matter, . . . is described or referred to by words importing the singular number . . . several matters . . . are included." Therefore, the terms "the case" and "the action" in Section 7 need not refer only to a single, continuous legal proceeding.

It would be futile to attempt to close records pertaining to one charge, while records pertaining to other charges which arose out of the same arrest did not have to be closed. Such records would likely be inextricably intertwined, if not actually identical. Therefore, we do not believe that the legislature intended Section 7 to require closing of records until all the charges which made up "the case" arising out of an arrest were resolved favorably to the arrested person by being nolle prossed, dismissed, or concluded by a finding of not guilty in the court in which the criminal charges were prosecuted.

5.

Your last question requires consideration of Section 545.300, RSMo 1969, which states as follows:

"An information may be amended either as to form or substance at any time before the jury is sworn, but no such amendment shall be allowed as would operate to charge an offense different from that charged or attempted to be charged in the original information. If an indictment be held to be insufficient either as to form or substance, an information charging the same offense charged or attempted to be charged in such indictment may be substituted therefor at any time before the jury is sworn. No amendment of the information or substitution of an information for an indictment as herein provided shall cause a delay of the trial unless the defendant shall satisfy the court that such amendment or substitution has made it necessary that he have additional time in which to prepare his defense." (Emphasis added)

This statute clearly forbids the filing of a substitute information which would charge a different offense from that charged in the original indictment or information. It frequently occurs that



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a defendant will plead guilty to a lesser offense than that charged against him by indictment or information, and a new information, to which the defendant will plead guilty, is "substituted" for the original charge, for purposes of the plea. However, it is our opinion that, under Section 545.300, such a procedure must be regarded as a dismissal or a nolle prosequi within the meaning of Section 7 of the Act, because it is not a continuation of the same proceedings begun by the original indictment or information. ". . . 'Dismissal signifies the final end of a suit, not a final judgment on the controversy, but an end of that proceeding.' 18 C.J. 1145. . . ." Cooper v. Associated Laundries, 83 S.W.2d 591, 592 (K.C.Ct.App. 1935). But court records of a plea of guilty to such reduced charges would not be closed under Section 7. (And those records which are closed under Section 7 remain available to law enforcement agencies for purposes of further litigation, if the defendant does not plead guilty to the new charge. See our Opinion No. 311, issued November 30, 1973, to Ralph L. Martin, copy of which is attached hereto).

However, Section 545.300 does contemplate the filing of amended informations which do not charge different offenses from those originally charged by indictment or information. It is our opinion that the filing of such an amended information does not, per se, constitute a dismissal within the meaning of Section 7 of Senate Bill No. 1.

#### CONCLUSION

Therefore, it is the opinion of this office with respect to Sections 6, 7 and 8 of Senate Bill No. 1, 77th General Assembly, relating to arrest records, that:

1. The provisions of the first sentence of Section 6 and the provisions of Section 7, relating to the closing of records of arrested persons, apply throughout the state of Missouri.
2. The second sentence of Section 6, relating to expungement of records of arrested persons, applies to all records, wherever maintained, of arrests which take place within the geographical confines of any city or county having a population of five hundred thousand or more.
3. Section 6 of the Act does not require closing of the records of an arrest if that arrest results in any criminal charge against the arrested person within thirty days.
4. Under Section 7 of the Act, official records need not be closed unless all charges arising out of an arrest are subsequently nolle prossed, dismissed, or result in findings of not guilty.

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5. Section 7 of the Act requires that official records be closed where the original indictment or information against the accused is dismissed and an information charging the accused with a different offense is subsequently filed, but does not apply where an amended information is filed charging the same offense as previously charged by indictment or information.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 299  
9/28/73, McNeal

Op. No. 311  
11/30/73, Martin

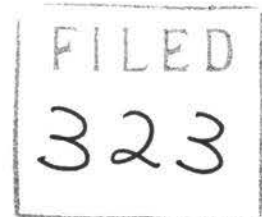
BAIL:  
POLICE:  
SUMMONS:

With respect to the issuance of summonses and the acceptance of bail by police officers of the City of St. Louis: 1. Neither the judges nor the prosecutors have the authority to establish systems or standards for the issuance of summonses for city ordinance or state law violations to be used by the St. Louis police department. 2. Police officers have authority under Supreme Court Rule 37.09 to serve a person with a summons instead of arresting such person in any case in which it is lawful for such officers to arrest the person without a warrant for violation of a city ordinance. In traffic cases Supreme Court Rule 37.46, which authorizes the issuance of a summons by police officers in the form of the uniform traffic ticket, is applicable to state misdemeanor traffic violations as well as municipal ordinance traffic violations. 3. Police officers in charge of the station houses in St. Louis, under Section 84.230, RSMo, have the authority, within certain limitations, to accept bail from a person arrested for a municipal violation or a violation of state law. 4. The Board of Police Commissioners has supervisory authority over officers acting pursuant to Supreme Court Rules 37.09 and 37.46 and Section 84.230, RSMo.

OPINION NO. 323

December 10, 1973

Mr. Curtis Brostron, Secretary  
Board of Police Commissioners  
1200 Clark Avenue  
St. Louis, Missouri 63103



Dear Mr. Brostron:

This is in response to your request for an opinion from this office as follows:

"1) Is there authority within the statutes or [Supreme Court] rules for the St. Louis Police Department to devise a system and establish standards for release on a summons for City ordinance violations and state misdemeanors (traffic and non-traffic)?

"2) If the answer to #1 is negative, may the judges and/or prosecutors of the appropriate jurisdictions devise such a system for implementation by the Department?

Mr. Curtis Brostron

"3) Do St. Louis police officers have the authority to determine the amount of bail in any arrest situation in which no complaint, information or warrant has yet been filed?"

We will consider these questions in a different order than which they have been submitted.

In answer to your second question as to whether the judges or the prosecutors may devise a system to be used by the St. Louis police department for release on summons for violation of city ordinances or for state misdemeanors, our answer is in the negative.

Article V, Section 5 of the Constitution of Missouri provides as follows:

"The supreme court may establish rules of practice and procedures for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose."

Under the above constitutional provision, the Supreme Court has promulgated rules regarding the practice and procedure in all municipal courts. Rules 37.01 et seq., govern the practice and procedure of all cases in all municipal courts.

The authority of police officers to issue a summons in cases involving municipal offenses is found in Supreme Court Rule 37.09 which provides:

"A summons instead of a warrant may issue on the filing of a complaint or information charging the commission of an offense if the judge or prosecutor has good reason to believe that the accused will appear in response thereto. In any case in which it is lawful for an officer to arrest a person without a warrant, he may serve such person with a summons instead of arresting the accused. The summons shall describe the offense charged and shall

Mr. Curtis Brostron

command the accused to appear at a stated time and place in answer thereto. The summons may be served in the same manner as a summons in a civil action. If the accused fails to appear as commanded by the summons, a warrant of arrest shall be issued." (Emphasis added)

It is our opinion that under this rule the arresting officer is given authority to serve the person with a summons instead of arresting such a person for any offense in which it is lawful for the officer to arrest without a warrant. The officer's authority under the second sentence of the rule is separate and distinct from the authority given judges and prosecutors under the first sentence of the rule. This rule is limited to municipal violations and does not apply to violations of state laws.

The authority of police officers to issue a summons in traffic cases for state misdemeanor violations as well as for violations of municipal ordinances is found in Supreme Court Rule 37.46 which authorizes police officers to issue a summons in the form of the uniform traffic ticket.

In answer to your third question asking whether the St. Louis police officers have authority to determine the amount of bail in any arrest situation in which no complaint, information or warrant has been filed, Section 84.230, RSMo, provides:

"The commissioners of police shall cause all persons arrested by the police to be brought before some proper magistrate within said cities, to be dealt with according to law. Proper police officers in charge of police station houses may, if the offense charged against any person is a bailable one, at the request of such person, take from him a recognizance in such sum as may seem to be sufficient and proper with sufficient sureties for his appearance at the proper time before some proper magistrate; but no attorney at law, police officer, constable or his deputy, and no official or employee holding office under the municipality of the said cities, or the state of Missouri, and no clerk in the employ of such officer, officials or employees shall be accepted as surety upon such bond or bonds; the proper officers in charge of said station houses may administer oaths

Mr. Curtis Brostron

to parties qualifying as such surety or sureties; and may refuse to receive as such surety or sureties any and all parties with unsavory reputations or who, as professional bondsmen, tend to defeat the ends of justice, and no one shall be accepted as bondsman who shall have standing against him as unsatisfied judgment rendered on a forfeited bond; such proper police officers in charge of police stations may, prior to the appearance of any person arrested before some proper magistrate, refuse to admit to the presence of arrested persons confined in stations, all persons who have the reputation of being what is known as grafters or shysters, or those attorneys who are guilty of the practice of soliciting business." (Emphasis added)

Under these provisions, the proper police officer in charge of a police station has authority to determine the amount of bail, if the offense charged is a bailable one, for the appearance of such person before the proper "magistrate." In our view, the term "magistrate," as used in the above section, is used in a generic sense (see Ballentine's Law Dictionary, Second Edition, "magistrate," page 780) and therefore this statute includes arrests for municipal violations as well as arrests for violations of state statutes.

In answer to your first question, the Board of Police Commissioners is the governing authority of the St. Louis police department under the provisions of Sections 84.010, RSMo et seq., and particularly Section 84.170, RSMo. Therefore, the Board has authority to establish standards for police officers to follow in the execution of such officers' discretion under Supreme Court Rules 37.09 and 37.46 and Section 84.230 because of the authority of such police officers is necessarily limited by the power of the Board to control the police force.

#### CONCLUSION

It is the opinion of this office with respect to the issuance of summonses and the acceptance of bail by police officers of the City of St. Louis that:

1. Neither the judges nor the prosecutors have the authority to establish systems or standards for the issuance of summonses for city ordinance or state law violations to be used by the St. Louis police department.



Mr. Curtis Brostron

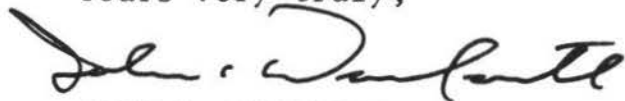
2. Police officers have authority under Supreme Court Rule 37.09 to serve a person with a summons instead of arresting such person in any case in which it is lawful for such officers to arrest the person without a warrant for violation of a city ordinance. In traffic cases Supreme Court Rule 37.46, which authorizes the issuance of a summons by police officers in the form of the uniform traffic ticket, is applicable to state misdemeanor traffic violations as well as municipal ordinance traffic violations.

3. Police officers in charge of the station houses in St. Louis, under Section 84.230, RSMo, have the authority, within certain limitations, to accept bail from a person arrested for a municipal violation or a violation of state law.

4. The Board of Police Commissioners has supervisory authority over officers acting pursuant to Supreme Court Rules 37.09 and 37.46 and Section 84.230, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General



SUNSHINE BILL: Meetings of the "committee of the whole"  
COUNTY COUNCIL: and subcommittees of the St. Louis County  
PUBLIC MEETINGS: Council are "public meetings" within the  
meaning of Section 1(1) of Senate Bill  
No. 1, 77th General Assembly, First Regular Session, and thus are  
required to be open to the public by Section 2 of said bill.

OPINION NO. 330

December 18, 1973

Honorable Harold L. Volkmer  
Representative, District 13  
Room 310, Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Volkmer:

This opinion is issued in response to your recent request for an official Attorney General's opinion construing certain provisions of Senate Bill No. 1, 77th General Assembly, First Regular Session, commonly known as the "Sunshine Bill." Your opinion request reads in full as follows:

"Thomas W. Wehrle, County Counselor for St. Louis County has by his opinion of September 27, 1973, to Gerald A. Rimmel, Chairman and members of the St. Louis County Council of St. Louis County, stated that the provisions of Senate Bill No. 1, 77th General Assembly, First Regular Session, commonly known as the Sunshine Bill, do not require meetings of the St. Louis County Council when it is meeting as a 'Committee of the Whole' to be opened to the public, and further that subcommittee meetings of the County Council are not required by the provisions of said bill to be opened to the public. I am hereby requesting your opinion as to whether or not the provisions of Senate Bill No. 1 as enacted by the 77th General Assembly, First Regular Session, commonly known as the Sunshine Bill, does require meetings of the St. Louis County Council when meeting as a Committee of the Whole, to be open to the public and further whether or not meetings of the sub-committees of the County Council of St. Louis County are required to be open to the public by said bill."

Honorable Harold L. Volkmer

Section 2 of the Sunshine Bill reads as follows:

"Except as provided in section 4 of this act, and except as otherwise provided by law, all public votes shall be recorded, and if a roll call is taken, as to attribute each 'yea' and 'nay' vote, or abstinence if not voting, to the name of the individual member of the public governmental body, and all public meetings shall be open to the public and public votes and public records shall be open to the public for inspection and duplication." (Emphasis added)

Section 1(2) of the Sunshine Bill defines "public meeting" as:

". . . any meeting, formal or informal, regular or special, of any public governmental body, at which any public business is discussed, decided or public policy formulated;"

"Public governmental body" is defined in Section 1(1) to mean:

". . . any constitutional or statutory governmental entity, including any state body, agency, board, bureau, commission, committee, department, division, or any political subdivision of the state, or any county or of any municipal government, school district or special purpose district, and any other governmental deliberative body under the direction of three or more elected or appointed members having rulemaking or quasi-judicial power;"

The St. Louis County Council is a legislative body, established by the 1968 County Charter pursuant to Article VI, Section 18, Constitution of Missouri, in which all legislative power is vested (Section 2.010, County Charter). Certain enumerated powers are granted to the Council with regard to the conduct of county business (Sections 2.180(1)-(34) and 2.190). The Council, at its regular and special meetings, casts its record votes to enact ordinances and resolutions. The enactments of the Council are subject to the approval of the Supervisor, but may be enacted over his veto by a two-thirds vote of the Council (Section 2.190).

At the outset, we note that your question apparently presumes-- and we think correctly so--that the regular and special meetings of the full County Council are covered by the provisions of Sections

Honorable Harold L. Volkmer

1 and 2 of the Sunshine Bill. On this point there can be no doubt. Counties, being political subdivisions of the state, are specifically included in the term "public governmental body" as defined in Section 1(1) of the Sunshine Bill and hence the regular and special meetings of the county's full legislative body are subject to the provisions of Section 2, which requires open meetings, open records, and open votes.

Your question, however, seeks to determine the applicability of the Sunshine Bill to meetings of the County Council's "committee of the whole" and to meetings of its subcommittees. Although the St. Louis County Charter makes no mention of the "committee of the whole" or subcommittees, we have been informed by the St. Louis County Counselor that the term "committee of the whole," as used in this sense, refers to executive sessions where the entire Council meets, whether by rule or by custom, to informally discuss public business, but at which time no official action is taken. We are also informed by the County Counselor that the Council's subcommittees, which are not empowered by the County Charter to take official action on proposed legislation, only engage in the discussion of proposals and make recommendations, which are then passed on to the Council as a whole, sitting in a duly authorized session.

Ultimately, then, the issue crystalizes into this question: Are meetings which do not include the entire membership of the governmental entity (such as subcommittees), or at which no official action is taken (such as the committee of the whole), exempt from the provisions of the Sunshine Bill requiring open meetings?

In our opinion, the plain language of Sections 1 and 2 of the Sunshine Bill requires that meetings of subcommittees of the St. Louis County Council and meetings of the Council as a "committee of the whole" be open to the public.

To begin with, courts of other states which have adopted public meeting laws similar to Missouri's Sunshine Bill have repeatedly held that such legislation, having been enacted for the public benefit, is to be liberally construed. Laman v. McCord, 432 S.W.2d 753 (Ark. 1968); Board of Public Instruction of Broward Co. v. Doran, 224 So.2d 693 (Fla. 1969); Brown v. State, 245 So.2d 41 (Fla. 1971).

Such decisions are consistent with the familiar rule of construction, frequently enunciated by Missouri courts, that statutes which introduce some new regulation or ordinance for the public good are to be considered remedial in nature and are generally to be given a liberal construction. City of St. Louis v. Carpenter,

Honorable Harold L. Volkmer

341 S.W.2d 786 (Mo. 1961). In B-W Acceptance Corporation v. Benack, 423 S.W.2d 215 (St.L.Ct.App. 1967), the court, at page 218, said:

" . . . one of the cardinal principles of construing remedial legislation is that courts are to consider the evil sought to be cured and 'to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief.' Decker v. Deimer, 229 Mo. 296, 129 S.W. 936 [4]."

As was pointed out previously, Section 2 of the Sunshine Bill requires, among other things, that aside from the exceptions detailed by Section 4 of the act or otherwise provided by law, "all public votes shall be recorded, . . . and all public meetings shall be open to the public . . ." (Emphasis added). "Public meeting" is defined by Section 1(2) as "any meeting, formal or informal, regular or special, of any public governmental body, at which any public business is discussed, decided or public policy formulated;" (Emphasis added). It would seem apparent from the repeated use of the words "all" and "any" that the General Assembly intended the scope of the bill to be all-inclusive. This impression is reinforced by the inclusion of "informal" as well as "formal" meetings within the bill's definition of "public meeting."

Additionally, the term "public governmental body" as defined by Section 1(1) contains an exhaustive list of governmental entities, followed by the catch-all phrase ". . . and any other governmental deliberative body under the direction of three or more elected or appointed members having rulemaking or quasi-judicial power;". Which again leads us to the inescapable conclusion that the legislature intended that the law have a broad, sweeping application.

Nevertheless, the opinion issued by the St. Louis County Counselor takes the position that subcommittee meetings and meetings of the committee of the whole of the St. Louis County Council are not covered by the provisions of the Sunshine Bill. The opinion seizes upon the word "other" in the catch-all phrase of Section 1(1) and reasons that for any of the governmental entities specifically listed in Section 1(1) to fall within the term "public governmental body" it must be a "deliberative body under the direction of three or more elected or appointed members having rulemaking or quasi-judicial power." And since the powers of the Council's subcommittees and the committee of the whole are limited to discussion and recommendation by the provisions of the

Honorable Harold L. Volkmer

County Charter, the opinion concludes that their meetings are not meetings of a "public governmental body . . . having rulemaking or quasi-judicial power" and therefore are not required to be open to the public. In addition, the opinion maintains that since the Council's subcommittees contain only a portion of the entire Council membership, their meetings are not meetings "of" the body within the scope of Section 2(2) which defines "public meeting" as any meeting "of any public governmental body."

It is our view that such technical arguments not only are contrary to the spirit of the legislation, but also ignore the plain language of Section 2(2). Specifically the County Counselor's contention that the ability to take formal action in a particular meeting is a statutory prerequisite of a "public meeting" would render meaningless the specific inclusion of "informal" meetings within the definition of public meetings. Furthermore, such a construction also overlooks the fact that by the express provisions of Section 1(2) public business need only be "discussed" at such gathering to qualify it as a "public meeting"; there is no requirement that formal or official action be taken.

We cannot agree with the contention that the "catch-all" phrase in Section 1(1) which begins "and any other governmental deliberative body . . ." is to be interpreted restrictively, so as to require any constitutional or statutory governmental entity specifically listed earlier in the section to possess "rulemaking or quasi-judicial power" in order to qualify as a "public governmental body." Such a construction reverses the rule of "ejusdem generis," which states that when general words in a statute follow particular words, the general words are to be explained and restricted by the particular. State ex rel. Rabenau v. Beckemeier, 436 S.W.2d 52 (St.L.Ct.App. 1968). Although there is some authority to the contrary, it generally has been held that subsequent general words do not explain or restrict the particular. See State v. Hemrich, 161 P. 79 (Wash. 1916).

Regardless, the ultimate guide in construing statutes is the intent of the legislature and rules of statutory construction are to be used only as aids in ascertaining that intent. Edwards v. St. Louis County, 429 S.W.2d 718 (Mo. banc 1968). Thus, keeping in mind the requirement that remedial legislation is to be liberally construed, City of St. Louis v. Carpenter, supra, it is our view that the plain intent of the legislature in employing the "catch-all" phrase of Section 1(1) was to add to or expand upon, rather than qualify or restrict, the list of agencies, boards, bureaus, commissions, etc., previously listed. Clearly, the legislature intended to set up two categories of governmental entities upon which the statute was to operate: One consisting of



Honorable Harold L. Volkmer

all bodies, boards, bureaus, commissions, etc., specifically listed, and the other consisting of "any other governmental deliberative body" which possessed certain characteristics and which was not included in the first category.

Finally, even if it is conceded for the sake of argument that the term "public governmental body" necessarily includes the possession of rulemaking or quasi-judicial power, it does not logically follow that subcommittee meetings or executive sessions, such as meetings of the committee of the whole, are not "public meetings." At the most, all that is required is that the "governmental entity"--in this case, the St. Louis County Council--possess rulemaking or quasi-judicial power. That being the case, "any meeting" of that governmental entity, whether it be a Council subcommittee meeting or a meeting of the committee of the whole, is required to be open to the public. Otherwise any rulemaking body could evade the plain intent of the law by always going into executive session for discussions, and only recording votes in public. The law obviously requires that at least the discussion concerning issues that are going to be voted on by rulemaking bodies be conducted before the public.

This conclusion is buttressed by decisions from other jurisdictions, particularly Selkove v. Bean, 249 A.2d 35, 38 A.L.R.3d 1066 (N.H. 1968), where the court ruled that the finance committee of the Keene City Council fell within the provisions of New Hampshire's open meeting law which stated:

" . . . 'All public proceedings are open to the public, and all persons are permitted to attend any meetings of these bodies and agencies' . . . " id. at 36

The court held that a meeting of the finance committee was a "public meeting" as that term was used in the statute. The court went on to hold that this type of meeting was specifically exempted from the "open meeting" requirements by a different statutory provision which permitted "executive sessions" of a governmental body as long as no "official action" was taken. However, Missouri's Sunshine Bill contains no such exception.

In Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, 69 Cal.Rptr. 480 (Cal.App. 1968), it was held that subcommittee meetings were specifically included within the ambit of California's open meeting law known as the Brown Act. More importantly, the court rejected a contention, similar to the argument made in the St. Louis County Counselor's opinion, that the word "meeting" did not encompass informal sessions at which no official action was taken. At page 487 of its opinion the court stated:

Honorable Harold L. Volkmer

"In this area of regulation, as well as others, a statute may push beyond debatable limits in order to block evasive techniques. An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can open meeting regulations frustrate these evasive devices. . . ."

The Missouri legislature obviously has made a concerted effort to foresee and forestall these "evasive devices" by specifically including "informal" meetings within the definition of "public meetings" and by avoiding any requirement that formal action be taken. Under the law, public business need only be "discussed" by such bodies and formal action does not have to be taken at that particular meeting in order for a meeting to qualify as a "public meeting."

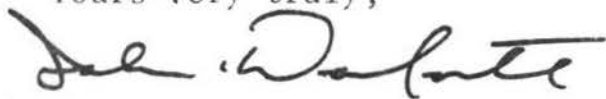
If the legislature had wished to exclude subcommittee meetings and executive sessions such as the meetings of the committee of the whole from the requirements of the Sunshine Bill, it could have easily done so. It is clear, however, that the legislature had no such intention.

#### CONCLUSION

It is the opinion of this office that meetings of the "committee of the whole" and subcommittees of the St. Louis County Council are "public meetings" within the meaning of Section 1(1) of Senate Bill No. 1, 77th General Assembly, First Regular Session, and thus are required to be open to the public by Section 2 of said bill.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Philip M. Koppe.

Yours very truly,



JOHN C. DANFORTH  
Attorney General



LEGISLATORS:  
GENERAL ASSEMBLY:  
CONSTITUTIONAL LAW:  
CONFLICT OF INTEREST:

A member of the General Assembly is not prohibited by the Constitution or state law from renting real estate which he owns to a state agency.

Caveat

Chapter 105 sections repealed  
and new sections now in force.

OPINION NO. 332

November 16, 1973

Honorable Margaret Miller  
Representative, District 145  
Post Office Box 72  
Marshfield, Missouri 65706



Dear Representative Miller:

This is in response to your request for an opinion from this office as follows:

"Is there a violation of the Missouri Constitution or any statute when a member of the General Assembly rents real estate to a state agency?"

It is our understanding that the request involves only a rental of real estate and that the member of the General Assembly is not to receive payment for any personal services under the rental agreement.

Sections 105.490 and 105.495 of the "conflict of interest law" are the only criminal statutes that might be applicable to a rental of real estate by a state officer or employee to a state agency. Section 105.490, RSMo, provides as follows:

"1. No officer or employee of an agency shall transact any business in his official capacity with any business entity of which he is an officer, agent or member or in which he owns a substantial interest; nor shall he make any personal investments in any enterprise which will create a substantial conflict between his private interest and the public interest; nor shall he or any firm or business entity of which he is an officer, agent or member, or the owner of substantial interest, sell any goods or services to any business entity which is licensed by or regulated in any manner by the agency in which the officer or employee serves.

Honorable Margaret Miller

"2. Any person who violates the provisions of this section shall be adjudged guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than five hundred dollars or by confinement for not more than one year, or both."

Section 105.495, RSMo, provides as follows:

"No officer or employee of an agency shall enter into any private business transaction with any person or entity that has a matter pending or to be pending upon which the officer or employee is or will be called upon to render a decision or pass judgment. If any officer or employee is already engaged in the business transaction at the time that a matter arises, he shall be disqualified from rendering any decision or passing any judgment upon the same. Any person who violates the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than five hundred dollars or confinement for not more than one year, or both."

However, Section 105.450, RSMo, provides the following terms as used in these statutes have the following meanings:

"(1) 'Agency', any department, office, board, commission, bureau, institution or any other agency, except the legislative and judicial branches of the state or any political subdivision thereof including counties, cities, towns, villages, school, road, drainage, sewer, levee and other special purpose districts;"  
(Emphasis added)

Under the above-statutory provision of Section 105.450, Sections 105.490 and 105.495, supra, do not apply to the legislative branch of the state.

It is, therefore, the opinion of this department that there is no violation of Sections 105.490 or 105.495, RSMo, when a member of the General Assembly rents real estate he owns to a state agency.

Honorable Margaret Miller

You also inquire whether there is a violation of the Missouri Constitution when a member of the General Assembly rents real estate to a state agency.

Article III, Section 12 of the Constitution of Missouri, provides as follows:

"No person holding any lucrative office or employment under the United States, this state or any municipality thereof shall hold the office of senator or representative. When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative. During the term for which he was elected no senator or representative shall accept any appointive office or employment under this state which is created or the emoluments of which are increased during such term. This section shall not apply to members of the organized militia, of the reserve corps and of school boards, and notaries public."

The above-constitutional provision prohibits any senator or representative from accepting any office or employment under the United States, this state or any municipality thereof, a violation of which results in the forfeiture of his office. It also prohibits him from accepting any appointive office or employment under this state which is created or emoluments increased during his term.

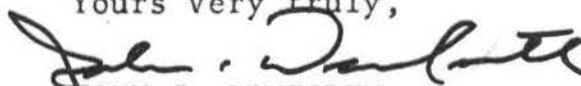
It is our opinion that a representative who merely rents real estate which he owns to a state agency does not come within this provision of the Constitution prohibiting the acceptance of any office or employment of the state.

#### CONCLUSION

It is the opinion of this office that a member of the General Assembly is not prohibited by the Constitution or state law from renting real estate which he owns to a state agency.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,



JOHN C. DANFORTH  
Attorney General



OFFICES OF THE

JOHN C. DANFORTH  
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

December 19, 1973

OPINION LETTER NO. 341

Honorable Cloy E. Whitney  
State Representative, 2nd District  
8 Center Road  
Kirksville, Missouri 65301

Dear Representative Whitney:

This letter is in response to your question with respect to House Bill No. 315 of the 77th General Assembly, Missouri's new divorce and domestic relations law, asking:

"Can a prosecuting attorney handle divorce cases or does his duties under Section 10, paragraphs 4 and 5 of the Act preclude and prevent a prosecuting attorney from representing a party in proceedings for dissolution of marriage?"

For the sake of brevity we will not quote the sections to which you refer.

The Missouri Bar Advisory Committee has already considered and ruled on the questions you ask. We defer to this authority which is given to the Committee under Supreme Court Rule 5.16. Such opinion, adopted December 6, 1973, which we quote, provides:

ADVISORY COMMITTEE  
MISSOURI BAR ADMINISTRATION

FORMAL OPINION #108

PROSECUTING ATTORNEY - "NO FAULT" DIVORCE LAW

Question: May a Prosecuting Attorney, in the course of his private law practice, represent clients who are parties to an action

Honorable Cloy E. Whitney

brought under Chapter 452 effective January 1, 1974? Is there a conflict of interest with the duties of the Prosecuting Attorney set out in paragraphs 4, 5 and 6 of Section 10 of said chapter.

Answer: It is the opinion of the Advisory Committee that there is no inherent conflict between the duties of the Prosecuting Attorney under the bill and the representation of a party to an action brought under the bill in the first instance. In other words, the Prosecuting Attorney can ethically represent a party in an original divorce action under the provisions of said bill. If, however, after the termination of the original divorce action, the Prosecuting Attorney is called upon to fulfill his duties under Section 10 and if at that time a conflict of interest exists, then, of course, the conflict must be resolved. It might be accomplished by withdrawal as attorney for the private client, the request for appointment of a special Prosecutor in that particular case, or both, depending upon the circumstances.

ADOPTED DECEMBER 6, 1973.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

APPROPRIATIONS: The provisions of House Bill No. 156.  
DIVISION OF WELFARE: 77th General Assembly, providing for  
AID TO DEPENDENT CHILDREN: benefit payments to aid to the blind  
and House Bill No. 514, 77th General  
Assembly, providing for benefits to aid to dependent children are  
in effect only until January 1, 1974, and thereafter the provisions  
of Senate Bill No. 325, 77th General Assembly, govern.

OPINION NO. 342

November 21, 1973

Mr. Bert Shulimson, Director  
Missouri Division of Welfare  
Broadway State Office Building  
Jefferson City, Missouri 65101



Dear Mr. Shulimson:

This is in response to your request for an opinion from this  
office as follows:

"The Missouri Division of Welfare under  
authority of House Bill 156 and Senate Com-  
mittee Substitute House Bill 514, first regu-  
lar session, 77th General Assembly increased  
benefits in the categories of Aid to Dependent  
Children and Aid to the Blind beginning Octo-  
ber 1, 1973.

"Senate Bill 325 passed during the same  
legislative session to become effective Janu-  
ary 1, 1974 or upon the operation date of Title  
XVI of public law 92-603 establishing the fed-  
eral program of supplemental security income  
for the aged, blind and disabled whichever oc-  
curs later, sets out specific limits of pay-  
ments less than those same limits set out the  
above mentioned two bills.

"House bill 156 applies to section 209.  
040 RSMo. Senate Committee Substitute for  
House bill 514 applies to Section 208.150  
RSMo. Senate Bill 325 applies to both of the  
foregoing sections. The question is on and  
after January 1, 1974 or upon the operation  
date of public law 92-603 establishing the

Mr. Bert Shulimson

Federal program does the Division of Welfare comply with Senate Bill 325 or continue the level of benefits as set out in House Bill 156 and Senate Committee Substitute for House Bill 514?"

House Bill No. 156, 77th General Assembly, was passed by the Senate on June 5, 1973, and approved by the Governor on June 23, 1973. Section 1 of said bill provides that Section 209.040, Missouri Revised Statutes, Laws of Missouri 1969, is hereby repealed and a new section enacted in lieu thereof to be known as Section 209.040. It provides for a vision test that is necessary for a person to have in order to be eligible for a blind pension and provides for a blind pension of \$110 per month.

Section 209.040, RSMo 1969, provided for a monthly pension of \$90 a month to a person eligible for a blind pension. Section 209.040, RSMo 1969, was repealed and reenacted by House Bill No. 286 in 1971. As reenacted the amount of benefits was increased to \$100 per month. RSMo Supp. 1971, page 215.

House Committee Substitute for Senate Bill No. 325, 77th General Assembly, hereinafter referred to as Senate Bill No. 325, was passed by the Senate on June 13, 1973, and approved by the Governor on July 16, 1973. This act repealed and reenacted numerous sections of Chapters 207 and 209, RSMo 1969, including Section 208.150, RSMo 1969, which determines the amount of aid to dependent children benefits, and Section 209.040, RSMo Supp. 1971, which determines the amount of blind pension, and reenacted new sections bearing the same numbers.

Section 208.150, as reenacted, provides for the amount of monthly benefits payable to or on behalf of needy persons including what is known as aid to dependent children as follows. It provides that the amount of assistance payable to an eligible relative caring for a dependent child shall not exceed \$33 for the needy eligible relative, \$43 for the first child and \$24 for each additional child. The maximum amount of these benefits are the same as were provided in the statute which was repealed.

Section 209.040, as reenacted in Senate Bill No. 325, provides for the vision test in substantially the same language as the repealed section and provides that a person eligible for a blind pension shall be entitled to receive a monthly pension of \$100. It further provides that such pension shall not be paid to any person receiving general relief assistance. The maximum amount of benefits remains the same as were provided in Section 209.040, RSMo Supp. 1971.



Mr. Bert Shulimson

Senate Committee Substitute for House Bill No. 514, 77th General Assembly, hereinafter referred to as House Bill No. 514, was passed by the House on June 14, 1973, and approved by the Governor on June 27, 1973. Section 1 of said act provides that Section 208.150, RSMo 1969, is repealed and a new section enacted in lieu thereof to be known as Section 208.150. Under this act the maximum amount to be paid in aid to dependent children benefits will not exceed \$38 per month for the needy relative, \$48 for the first child, and \$29 for each additional child. This is greater than the benefits provided for in Senate Bill No. 325 for such persons.

Senate Bill No. 325 further provides as follows:

"Section A. Sections 1, 207.010, 207.060, 208.010, 208.015, 208.030, 208.042, 208.060, 208.120, 208.150, 208.160, 208.170, and 209.040 of this act shall become effective January 1, 1974, or upon the operational date of Title XVI of public law 92-603, establishing the federal program of supplemental security income for the aged, blind and disabled, whichever occurs later."

You inquire whether the Division of Welfare should comply with Senate Bill No. 325 or continue the level of benefits as set out in House Bill No. 156 and House Bill No. 514 after the effective date of Senate Bill No. 325, which is January 1, 1974, or the operative date of Title XVI of Public Law 92-603 establishing the federal program of supplemental security income for the aged, blind, and disabled whichever date is later.

The fundamental rule of statutory interpretation is first to seek the intention of the lawmakers and, if possible, to effectuate that intention. The legislative intent should be ascertained from the words used, if possible, and ascribed to the language used its plain and rational meaning. Marty v. State Tax Commission of Missouri, 336 S.W.2d 696 (Mo. 1960).

In State ex rel. Karbe v. Bader, 78 S.W.2d 835 (Mo. banc 1934), the issue before the court involved two separate acts passed at the same legislative session dealing with the same subject matter. Specifically, the question was whether House Bill No. 44, the later enacted, superseded, repealed or supplanted the earlier and apparently inconsistent enactment, Senate Bill No. 94.

Senate Bill No. 94, commonly known as the Jones-Munger Law, was passed March 25, 1933, signed by the Governor on April 7, 1933, and became effective July 24, 1933. Laws of Missouri 1933, page 425.

Mr. Bert Shulimson

It expressly repealed numerous sections of the statutes including Section 9952, RSMo 1929, relating to the collection of delinquent and back taxes. The method of foreclosure of state liens for delinquent taxes, which for many years had been by suit in a court of competent jurisdiction, was radically changed, and Section 9925, which authorized such suits was expressly repealed and a new scheme for foreclosure by sale by the collector was provided for without suit.

House Bill No. 44 was passed with an emergency clause on April 1, 1933, approved by the Governor on April 28, 1933. Laws of Missouri 1933, page 465. It expressly repeals Section 9952, RSMo 1929, and enacted a new section to be known as Section 9952, which provided for the collection of back taxes by suit in a court of competent jurisdiction. It further provided for the employment of necessary attorneys. With the exception of the provision regarding attorneys, Section 9952, RSMo 1929, remained in all other respects unchanged. The question before the court was whether House Bill No. 44, which was enacted at the same legislative session, should govern over Senate Bill No. 94, due to the fact it was later enacted by the same legislature. In arriving at its decision the court stated that where two acts are passed at the same session of the legislature, relating to the same subject matter, as here, they are in pari materia, and to arrive at the true legislative intent, they must be construed together. In holding that Senate Bill No. 94 should govern, the court stated, l.c. 839-840:

"There was nothing in House Bill No. 44 in the nature of new legislation. Its sole object was to amend section 9952 (the effective law at the time House Bill No. 44 was introduced) in so far as it related to back tax attorneys in counties of a designated population. It seems obvious, and we hold that the nominal re-enactment of section 9952 by House Bill No. 44 was not intended to, nor did it have the effect of impliedly repealing or otherwise disturbing the Jones-Munger Act. We think that by attaching an emergency clause to House Bill No. 44, the Legislature intended that it should be operative only until such time as Senate Bill No. 94 took effect, the latter measure not having received executive approval at the time the former was passed. But we must hold bad, as the parties tacitly concede, the emergency clause just mentioned because invalid on its face and, therefore, wholly ineffectual to

Mr. Bert Shulimson

make House Bill No. 44 operative upon being signed by the Governor, and so upon the happening of the latter event, House Bill No. 44 became nugatory, and as if never passed. This ruling is in harmony with controlling canons of construction, and, as we believe, causes the true legislative intent to speak."  
(emphasis added)

Senate Bill No. 325, although it was passed on June 13, 1973, and approved by the Governor on July 16, 1973, expressly provides that it does not become effective before January 1, 1974, which is subsequent to the effective dates of House Bill No. 156 and House Bill No. 514. A statute which is to take effect in the future speaks from the date it becomes effective and not from the date of its enactment. State ex rel. Brunjes v. Bockelman, 240 S.W. 209 (Mo. banc 1922).

It is our opinion that the provisions of Senate Bill No. 325, 77th General Assembly, should govern after it becomes effective on January 1, 1974, or upon the operational date of Title XVI of Public Law 92-603, whichever occurs later. Although House Bill No. 514 was passed by the legislature and signed by the Governor after Senate Bill No. 325 had been passed by the legislature and signed by the Governor, it was intended by the legislature that Senate Bill No. 325, which covered these same subjects, would govern after it became effective on January 1, 1974, as provided in Section A. House Bill No. 156 and House Bill No. 514 were intended to apply only from the date of their enactment until January 1, 1974, when Senate Bill No. 325 becomes effective and the federal assistance program also becomes effective.

#### CONCLUSION

It is the opinion of this office that the provisions of House Bill No. 156, 77th General Assembly, providing for benefit payments to aid to the blind and House Bill No. 514, 77th General Assembly, providing for benefits to aid to dependent children are in effect only until January 1, 1974, and thereafter the provisions of Senate Bill No. 325, 77th General Assembly, govern.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

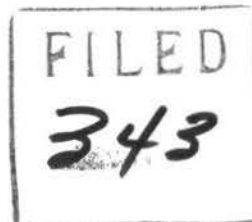
USURY:

A national bank may charge interest at the rate permitted by state law, or at a rate of one percent in excess of the discount rate prescribed by the federal reserve bank for the district in which the national bank is situated, whichever is higher.

OPINION NO. 343

November 21, 1973

Honorable Kenneth J. Rothman  
State Representative, District 77  
90 Aberdeen Place  
Clayton, Missouri 63105



Dear Representative Rothman:

This official opinion is issued in response to your request dated October 25, 1973, in which you inquire about the propriety of a national bank's charging interest to an individual borrower which is in excess of the interest rate established by state law.

12 U.S.C., Section 85, applicable to national banks, reads in pertinent part as follows:

"Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. . . ."

It can be seen that this statutory provision allows the national banks to charge interest rates in excess of those prescribed by state law, if the federal reserve bank for the district in which the national bank is situated has established a discount rate for ninety-day commercial paper which is within

Honorable Kenneth J. Rothman

one percent of the maximum rate permitted by state law. Missouri has no special provisions for interest rates permitted to banks organized under state law. Any such provision, indeed, would seem to be an impermissible classification of lenders under the prohibition of Article III, Section 44 of the Missouri Constitution.

It is unusual for national banks to enjoy a preferred provision, but the authority of Congress to establish national banks has been long recognized. McCulloch v. Maryland, 4 Wheat. 316 (1819). Congress also has the authority to determine which provisions of state law are to apply to national banks. Davis v. Elmira Savings Bank, 161 U.S. 275 (1896); Franklin National Bank of Franklin Square v. New York, 347 U.S. 373 (1954).

It seems clear from the statute that national banks in Missouri have a dual frame of reference by means of which the validity of their interest charges on loans to individuals may be gauged.

#### CONCLUSION

It is the opinion of this office that a national bank may charge interest on loans to individuals at the rate permitted by state law, or at a rate of one percent in excess of the discount rate for ninety-day commercial paper as established by the federal reserve bank for the district in which the national bank is situated, whichever is the higher.

The foregoing opinion, which I hereby approve, was prepared by my special assistant, Charles B. Blackmar.

Very truly yours,



JOHN C. DANFORTH  
Attorney General



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
ATTORNEY GENERAL OF MISSOURI  
JEFFERSON CITY

December 28, 1973

AMENDED OPINION LETTER NO. 352

Mr. James R. Spradling  
Director of Revenue  
Room 401, Jefferson Building  
Jefferson City, Missouri 65101

Dear Mr. Spradling:

This is in response to your request for an opinion as to whether or not commercial motor vehicles may be licensed for fractional portions of a year with an accompanying reduction in the annual license fees.

It is our information that certain commercial motor vehicle owners have taken the position that they can register their vehicle each year in June for the remaining six months of the year, but that no registration would apply to this vehicle for period from January to June as long as the vehicle were not being used.

Their reasoning is based upon the language in Section 301.030, sub. 3, RSMo 1969, which states in pertinent part:

" . . . The fees for all renewal prorate licensed vehicles shall be payable not later than the last day of February of each year, except when such vehicle is licensed between April first and July first the fee shall be three-fourths the annual fee, when licensed between July first and October first the fee shall be one-half the annual fee and when licensed on or after October first the fee shall be one-fourth the annual fee. . . ."

However, in tracing the historical development of commercial motor vehicle licensing and registration, it becomes clear that

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the terms "prorate registration" and "prorate licensed vehicles" refer to a certain type of commercial motor vehicle only, and not to all commercial motor vehicles. Prior to 1958, all commercial motor vehicles were treated alike. They were registered and licensed under the provisions of subsection 3 of Section 301.030, which reads as follows:

"All commercial motor vehicles must be registered with the director on a calendar year basis. The fee on all such commercial motor vehicles shall be payable not later than January 15 of each year, except when such vehicle is licensed between April 1 and July 1 the fee shall be three-fourths the annual fee, when licensed between July 1 and October 1 the fee shall be one-half the annual fee and when licensed on or after October 1 the fee shall be one-fourth the annual fee. Local commercial motor vehicle license plates shall not be the same color as license plates which are to be used on other commercial motor vehicles. Local commercial motor vehicle license plates shall also be so stamped, marked or designed as to indicate they are to be used only on local commercial motor vehicles. In addition, all commercial motor vehicle license plates shall be so stamped or marked with a letter, figure or other emblem as to indicate the gross weight for which issued." (Laws of Missouri, 1951, pages 698-699)

However, in 1958, the legislature passed legislation setting up the Missouri Highway Reciprocity Commission. See Sections 301.271 to 301.279, RSMo 1969. The Commission was empowered to enter into agreements with other states whereby commercial motor vehicles could be licensed in this state on an apportionment or prorate basis determined by the number of miles traveled on and the use made of Missouri highways. See Section 301.277(2), RSMo 1969. This then set up two types of commercial motor vehicle licenses, full-fee licenses for those owners who could not qualify or were not subject to any applicable agreement, and prorate licenses for those owners whose vehicles were subject to any prorate agreement entered into with other jurisdictions by the Missouri Highway Reciprocity Commission.

In 1965, subsection 3 of Section 301.030 was changed into its present form. See Laws of Missouri, 1965, page 468. It now reads:



Mr. James R. Spradling

"All commercial motor vehicles must be registered with the director on a calendar year basis. The application for renewal prorated registration shall be made on or before December first of each year. The fee on all commercial motor vehicles, trailers, semitrailers or driveaway vehicles shall be payable not later than January fifteenth of each year. The fees for all renewal prorated licensed vehicles shall be payable not later than the last day of February of each year, except when such vehicle is licensed between April first and July first the fee shall be three-fourths the annual fee, when licensed between July first and October first the fee shall be one-half the annual fee and when licensed on or after October first the fee shall be one-fourth the annual fee. Local commercial motor vehicle license plates shall not be the same color as license plates which are to be used on other commercial motor vehicles. Local commercial motor vehicle license plates shall also be so stamped, marked or designed as to indicate they are to be used only on local commercial motor vehicles. In addition, all commercial motor vehicle license plates shall be so stamped or marked with a letter, figure or other emblem as to indicate the gross weight for which issued."

As can be seen, there is no provision in this particular section for fractional registration of a full-fee commercial motor vehicle license. The law states that full-fee commercial motor vehicles are to be registered on a calendar year basis and the annual fee is payable not later than January fifteenth of each year.

However, the full-fee licensing requirements for commercial motor vehicles licensed for 12,000 pounds or less has been changed by an act of the 77th General Assembly. House Bill No. 25, which became effective September 28, 1973, provides as follows:

"SECTION 1. Chapter 301, RSMo, is amended by inserting therein one new section to be known as section 301.035 and to read as follows:

301.035.

1. Notwithstanding other provisions of

Mr. James R. Spradling

this chapter, commencing January 1, 1974, commercial motor vehicles to be licensed for twelve thousand pounds or less shall be registered on a monthly series basis in the manner provided for motor vehicles other than commercial motor vehicles.

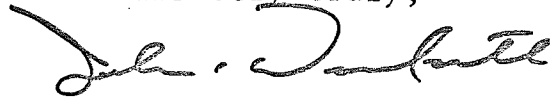
2. During the time necessary to change over from the present system of annual calendar year registration to the monthly series system, all commercial motor vehicles to be licensed for twelve thousand pounds or less shall be registered for one of twelve registration periods, which shall vary in length from a minimum of six consecutive calendar months to a maximum of seventeen calendar months. In the order of the receipt of applications for registration for the vehicles by the owners thereof, the director shall allocate to each of the twelve registration periods the number of the vehicles that will in his judgment distribute as uniformly as practicable the clerical work of registering the vehicles throughout the twelve month period in which registration shall expire and come up for renewal. Each period shall commence January 1, 1974. The first period shall expire June 30, 1974; the second, July 31, 1974; the third, August 31, 1974; the fourth, September 30, 1974; the fifth, October 31, 1974; the sixth, November 30, 1974; the seventh, December 31, 1974; the eighth, January 31, 1975; the ninth, February 28, 1975; the tenth, March 31, 1975; the eleventh, April 30, 1975; the twelfth, May 31, 1975. Upon the expiration of the initial registration period, the vehicles so registered shall thereafter be registered for twelve month periods.

3. The fees for registrations of such vehicles may be prorated and the prorated fee shall be paid in the manner provided in section 301.030. Applications for prorate registration shall be made at the time and in the manner prescribed by the director of revenue."

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Therefore, it is our opinion that an owner cannot register a full-fee commercial motor vehicle licensed in excess of 12,000 pounds for a fractional portion of a year and thereby escape the full annual fee for that vehicle. As of January 1, 1974, commercial motor vehicles licensed for 12,000 pounds or less are to be registered in accordance with the provisions of House Bill No. 25.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH  
Attorney General

SUNSHINE BILL:  
CRIMINAL PROCEDURE:  
CRIMINAL LAW:  
ARREST:

When a person is arrested and charged with an offense within thirty days of the arrest but the case is nolle prossed, official records pertaining to the case, including records of the arrest, are to be closed but are not subject to expungement.

OPINION NO. 354

December 13, 1973

Honorable Kenneth J. Rothman  
State Representative, District 77  
Room 309 State Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Rothman:

This official opinion is issued in response to your request for a ruling on the following question:

"What effect would the provisions of Act 172 of the 77th General Assembly have in situations where the circuit attorney's office issues a memorandum of nolle prosequi for various reasons and then after one years time issues a warrant on the same charge? Is the record of the first arrest automatically expunged after one years period of time?"

The statute in question, C.C.S.S.B. No. 1, 77th General Assembly (1973), reads, in pertinent part, as follows:

"Section 6. If any person is arrested and not charged with an offense against the law within thirty days of his arrest, all records of the arrest and of any detention or confinement incident thereto shall thereafter be closed records to all persons except the person arrested. If there is no conviction within one year after the records are closed, all records of the arrest and of any detention or confinement incident thereto shall be expunged in any city or county having a population of five hundred thousand or more.

Honorable Kenneth J. Rothman

"Section 7. If the person arrested is charged but the case is subsequently nolle prossed, dismissed or the accused is found not guilty in the court in which the action is prosecuted, official records pertaining to the case shall thereafter be closed records to all persons except the person arrested or charged."

We assume that your question refers to a situation in which the arrested person has been charged with an offense within thirty days of his arrest, so that his records have not been closed under the terms of the first sentence of Section 6 of C.C.S.S.B. No. 1.

Initially, we point out that the second sentence of Section 6 of the Act, relating to the expungement of records, applies only to the records of arrests which take place within the geographical confines of any city or county having a population of five hundred thousand or more. However, the first sentence of Section 6 and the provisions of Section 7, which relate to the closing of records, apply throughout the State of Missouri. See our Opinion No. 321, issued December 10, 1973, to Colonel Samuel S. Smith, a copy of which is attached hereto.

The crucial aspect of your question is the relationship between Section 7 and the expungement provisions of Section 6. The second sentence of Section 6 provides for expungement, in any city or county having a population of five hundred thousand or more, "if there is no conviction within one year after the records are closed." We must analyze whether the word "closed", in this context, refers to the closing of records which takes place under Section 7, or only to the closing which takes place under the provisions of the first sentence of Section 6.

We do not believe that records which have been closed under Section 7 are subject to expungement under Section 6. We note that the records which are subject to expungement are "all records of the arrest and of any detention or confinement incident thereto." That language is identical to the description of the records which are subject to closing under the provisions of the first sentence of Section 6. But, in Section 7, the records to be closed include "official records pertaining to the case," which, in our Opinion No. 311, issued November 30, 1973, to Ralph L. Martin, we indicated to be a more comprehensive category of records than "records of the arrest and of any detention or confinement incident thereto." (We enclose a copy of Opinion No. 311.) In other words, even if some of the records closed under Section 7 were subject to expungement, others would not be.

Honorable Kenneth J. Rothman

In Graves v. Little Tarkio Drainage Dist. No. 1, 134 S.W.2d 70, 78 (Mo. 1939), it was stated that:

" . . . ' . . . a statute should be so construed that effect may be given to all of its provisions, so that no part, or section, will be inoperative, superfluous, contradictory, or conflicting, and so that one section, or part, will not destroy another. Sutherland on Statutory Construction (2d Ed.) 731, 732, § 380. . . . ' . . . ."

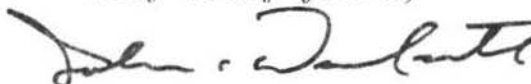
It would be superfluous and contradictory to require the expungement of some records closed under Section 7 (those relating to the arrest and any detention or confinement incident thereto) but not to require expungement of others (any other records pertaining to the case). The protection afforded by expungement would then be useless, and we do not presume that the legislature intended such a result.

#### CONCLUSION

Therefore, it is the opinion of this office that, when a person is arrested and charged with an offense within thirty days of the arrest but the case is nolle prossed, official records pertaining to the case, including records of the arrest, are to be closed but are not subject to expungement.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Very truly yours,



JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 321  
12/10/73, Smith

Op. No. 311  
11/30/73, Martin

December 13, 1973

OPINION LETTER NO. 358  
Answer by Letter - Klaffenbach

Honorable Richard E. Martin  
State Representative, 7th District  
912 Corby Building  
St. Joseph, Missouri 64501



Dear Representative Martin:

This letter is in response to your opinion request asking:

"1. Does Article III, Section 12 of the Constitution of Missouri, or any other provision of the Constitution or laws of this State prohibit a member of the General Assembly from accepting payment from the United States of America, in accordance with the provisions of the Criminal Justice Act (18 USC § 3006A), for the representation of an indigent defendant charged with a federal felony or misdemeanor where such representation is provided pursuant to and required by an order of appointment entered by a United States District Judge or United States Magistrate?

"2. Where a member of the General Assembly is engaged in the practice of law in partnership with other lawyers and all fees received by any partner or associate of such law firm are shared by all partners, does Article III, Section 12 of the Constitution of Missouri, or any other provision of the Constitution or laws of this State prohibit a law partner or law associate of such a member from accepting payment from the United States of America, in accordance with the provisions of the Criminal Justice Act (18 USC § 3006A), for the



Honorable Richard E. Martin

representation of an indigent defendant charged with a federal felony or misdemeanor where such representation is provided pursuant to and required by an order of appointment entered by a United States District Judge or United States Magistrate?"

You further state that:

"U.S. District Judges and U.S. Magistrates have the duty of appointing attorneys to represent indigent defendants who are charged with federal violations and who cannot employ their own attorney. The appointments are made on a case by case basis from a roster of practicing and qualified attorneys. The attorneys are compensated in accordance with the schedule set forth in 18 USC § 3006A. Many members of the General Assembly are practicing and qualified attorneys. The U.S. District Judges and Magistrates are uncertain if those members of the General Assembly should be considered eligible for the appointments and compensation or not."

In our view your question is answered by our Opinion No. 34, January 5, 1973, to Bradshaw, copy enclosed, in which we held that a member of the General Assembly who accepts an appointment and receives compensation as an attorney to represent indigent defendants by a court as provided in House Bill No. 1314, 76th General Assembly, Second Regular Session, violates the provisions of Section 12, Article III of the Missouri Constitution, and that other members of the law firm are disqualified from accepting such appointments for compensation. We are also enclosing our Opinion No. 355, August 19, 1969, to Salveter, which is self-explanatory.

We conclude that a legislator accepting such employment for compensation would come within the prohibition of Section 12, Article III, and that, for the reasons stated in the enclosed opinions, such employment could not be accepted by members of the legislator's law firm.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Honorable Richard E. Martin

Enclosures: Op. No. 34  
1/5/73, Bradshaw  
Op. No. 355  
8/19/69, Salveter

December 6, 1973

OPINION LETTER NO. 361  
Answer by letter-Klaffenbach

Honorable Max Bacon  
Representative, District 148  
1447 East Kearney  
Springfield, Missouri

Honorable George J. Donegan  
Representative, District 146  
1714 East Meadowmere  
Springfield, Missouri



Gentlemen:

This letter is in response to your opinion request in which you ask whether volunteer fire fighters have bona fide police duties enabling them to receive deputy sheriffs' commissions. It is also our understanding that such volunteer firemen are members of a purely private association not connected with any political subdivision of this state.

You also stated:

"Greene County volunteer fire fighters are called on to fight fires in the county and to assist civil defense personnel in dealing with other emergencies. They are dispatched out of the Greene County Sheriff's office. Most often these fires occur on private property. This necessitates entry onto private property, including entry into buildings and areas enclosed by fences, often without permission of the owner. There are times during fires that it is necessary for the fire fighters to control crowds and traffic in the vicinity of the fire. It is often necessary to go through private property other than that on which the fire is

Honorable Max Bacon  
Honorable George J. Donegan

located to get to the location of the fire, and on occasions permission to do so has been denied by the owner. In connection with their duties they are at times subject to being physically accosted."

We find no statutes giving such volunteer associations any police powers except for Section 307.175, RSMo, which authorizes volunteer firemen to use special vehicle sirens and warning lights under certain circumstances.

Sheriff's deputies in second class counties are appointed under the authority of Section 57.220, RSMo, which provides:

"The sheriff, in a county of the second class, shall be entitled to such a number of deputies as the judges of the circuit court shall deem necessary for the prompt and proper discharge of the duties of his office, provided however, such number of deputies appointed by the sheriff shall not be less than one chief deputy sheriff and one additional deputy for each five thousand inhabitants of the county according to the last decennial census. Such deputies shall be appointed by the sheriff, but no appointment shall become effective until approved by the judges of the circuit court of the county. The judges of the circuit court, by agreement with the sheriff, shall fix the salaries of such deputies. A statement of the number of deputies allowed the sheriff, and their compensation, together with the approval of any appointment by the judges of the circuit court shall be in writing and signed by them and filed by the sheriff with the county court."

Further Section 57.270, RSMo, provides:

"Every deputy sheriff shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff."

In our Opinion No. 97, 1968, to Burlison, this office held that there is no distinction between part-time deputies and full-time deputies if the appointments are made pursuant to Section 57.220. However, we also held in Opinion No. 299, 1972, to

Honorable Max Bacon  
Honorable George J. Donegan

Wampler, that special or emergency deputy sheriffs may be appointed for a period not exceeding thirty days under the provisions of Section 57.119, RSMo, and "honorary deputy sheriffs' commissions" are not authorized under either section. We also noted in Opinion No. 169, 1973, to White, that appointments as peace officers cannot be used as a subterfuge for the purpose of permitting the carrying of concealed weapons.

Further, in Opinion No. 373, 1969, to Weier, we held that salaries of all deputies appointed under Section 57.220, RSMo, should be at least in a nominal amount to comply with the provisions of that section.

Thus, it appears that voluntary firemen may be appointed part-time deputy sheriffs under the provisions of Section 57.220 if the appointments comply with the provisions of that section and after being so appointed, possess the powers of the sheriff under whom they hold office.

For your complete information we are enclosing copies of the opinions cited.

Yours very truly,

JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 97  
2-6-68, Burlison  
  
Op. No. 299  
11-21-72, Wampler  
  
Op. No. 169  
6-11-73, White  
  
Op. Ltr. No. 373  
9-11-69, Weier

CRIMINAL LAW: Public defenders, except when operating  
PUBLIC DEFENDER: under certain federal grants, have no  
COOPERATIVE AGREEMENTS: authority to provide services to indigent juveniles or indigents charged with misdemeanors and cannot contract with the City of St. Louis for additional assistants to perform such services.

OPINION NO. 363

December 4, 1973

Honorable Kenneth J. Rothman  
State Representative, District 77  
309 State Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Rothman:

This opinion is in response to your opinion request asking:

- "a) Is a circuit public defender precluded from providing public defender services to indigent juveniles and indigents charged with misdemeanors?
- "b) If a circuit public defender is not precluded from providing services to indigent juveniles and indigents charged with misdemeanors could he exceed his authorized staff of 15 lawyers in order to provide services to these individuals if the state were reimbursed?
- "c) Can the City of St. Louis contract with the state to provide the aforementioned services?"

In answer to your first question, there is no statutory authority under House Bill No. 1314, 76th General Assembly, relating to such defenders which would authorize them to use state funds to provide such services. Your attention is called to Senate Bill No. 52, and its amendments, of the 77th General Assembly, which did not pass. Such bill would have extended the authority of the public defenders to represent indigent persons in misdemeanor, sexual psychopath, mental health, incompetency and juvenile proceedings.

We held in our Opinion No. 108, dated February 23, 1973, to Senator Lee, that such defenders could employ additional assistants

Honorable Kenneth J. Rothman

to be paid from federal grant funds for the purpose of defending indigents in juvenile and misdemeanor cases and we remain of that view despite the fact that Senate Bill No. 52 did not pass. However, as noted therein, our views respecting such use of federal funds were limited to the precise question presented and we do not believe the reasoning employed in that opinion can be extended in these premises.

In answer to your second question asking whether the defender may exceed his authorized staff in order to provide such services if the "state were reimbursed", it is our view that he may not do so. In analyzing this question, however, it must be considered in conjunction with your third question.

Your third question asks whether the City of St. Louis can contract with the state to provide the aforementioned services. Any question of reimbursement or contract is dependent upon whether or not the public defender has authority under the provisions of Sections 70.210, RSMo et seq., to enter into such contracts. These cooperative agreement sections require first of all that the city or political subdivision, as therein defined, have the power to do that which they desire to contract to do and presupposes that the "state" officer also has such power. Without passing on the question of the city's power in these premises it is clear that the public defender has no such statutory power and therefore we conclude that such a contract is not authorized by law.

As we noted in our opinion to Senator Lee, which we have enclosed, the changes in the court rulings with respect to juvenile and misdemeanor cases make it imperative that the public defenders be given the power to respond to the demands of justice. The resolution of the problems which exist, noted by your questions, is however, in our view, a matter for determination by the Missouri General Assembly.

We have provided you with summary answers to your questions in view of your request for an expedited response.

#### CONCLUSION

It is the opinion of this office that public defenders, except when operating under certain federal grants, have no authority to provide services to indigent juveniles or indigents charged with misdemeanors and cannot contract with the City of St. Louis for additional assistants to perform such services.



Honorable Kenneth J. Rothman

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a prominent initial "J" and a long, sweeping underline.

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 108  
2/23/73, Lee